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found "that the piggery on Beaver Brook did not at any time substantially or materially contribute to the pollution of the brook during the period considered, and that the rendering plant above the mill ceased to do business in 1902, and did not contribute substantially or materially to the pollution of the brook before 1902." By reason of these findings the sixth and seventh requests for rulings which the defendant asked the master to give were inapplicable to the case. The rulings made by the single justice upon this question have done no injury to the defendant, and afford to it no ground of complaint.

The master's finding that the plaintiff had a prescriptive right to pollute the water at his paper mill made it unnecessary to give the ruling requested by the defendant, that in computing the rental value of his property the plaintiff was not entitled to include any profit due to his own illegal pollution of the stream. No such illegal pollution by the plaintiff was found. And the defendant's claim that it had put in as strong evidence of its own prescriptive right as that upon which this finding in favor of the plaintiff was made, if we assume that this position is now open to it, merely illustrates the rule that findings made by a master upon conflicting evidence are not lightly to be overthrown. The evidence in support of the two contentions did not seem to him to be equally strong, and we cannot reverse his conclusion.

On the master's findings, the plaintiff's claim for additional damages was properly disallowed.

It is unnecessary to consider the exceptions in detail. As we discover no reason for disagreeing with the findings of the master that have been contested before us, and no error of law in dealing therewith, the decree entered by the single justice must be affirmed; and it is.

So ordered.

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HARRIS MOSHENZ *vs.* INDEPENDENT ORDER AHAWAS ISRAEL. RACHEL SUPIRIOR *vs.* SAME.

Suffolk. December 4, 1912. — June 16, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & DE COURCY, JJ.

Fraternal Beneficiary Corporation. Contract, Performance and breach.

A foreign fraternal beneficiary corporation, engaged in this Commonwealth in the business of insurance conducted on the lodge system, issued to a member of a lodge a death benefit certificate by which it promised to pay to a certain beneficiary on the death of the member a certain sum to be collected by assessments made upon the other members, or such part of that sum as would be produced by one full assessment. On an information filed by the Attorney General under R. L. c. 119, § 19, the corporation was enjoined "from prosecuting any business of such corporation within this Commonwealth." The member thereafter died while in good standing, and the beneficiary named in the certificate duly presented a claim thereunder. Subsequently the injunction was modified to permit the corporation to defend actions brought against it and "to pay such claims as are now pending against it." The corporation refused to levy an assessment or to pay anything under the certificate, and the beneficiary brought an action thereon. *Held,* that the injunction as modified did not permit the corporation to levy an assessment for the payment of the plaintiff's claim, and that a further modification to that effect should not be created by implication; and therefore, no assessment having been levied and the defendant not being in default for not having made the levy, it had committed no breach of the contract of insurance by not paying the plaintiff's claim, although the contract of insurance remained in force.

TWO ACTIONS OF CONTRACT by beneficiaries under death benefit certificates issued by the defendant, a fraternal beneficiary corporation incorporated in New York. Writs dated respectively February 11 and April 14, 1905.

The cases were heard together by *Aiken,* C. J., upon agreed statements of facts. The eighth ruling asked for by the defendant and given by the Chief Justice, as stated in the opinion, was as follows:

"In this particular instance, no assessment was or could be levied by reason of the injunction order; hence there is no mode of enforcing the collection of the assessment, and no mode of providing for payment of same, unless the defendant would wil-

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MASSACHUSETTS REPORTS

215

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

MAY 1913—OCTOBER 1913

HENRY WALTON SWIFT

REPORTER

BOSTON
LITTLE, BROWN, AND COMPANY.
1914

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JUSTICES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. ARTHUR PRENTICE RUGG, CHIEF JUSTICE.
HON. JAMES MADISON MORTON.
HON. JOHN WILKES HAMMOND.
HON. WILLIAM CALEB LORING.
HON. HENRY KING BRALEY.
HON. HENRY NEWTON SHELDON.
HON. CHARLES AMBROSE DECOURCY.

ATTORNEY GENERAL

HON. JAMES MARCUS SWIFT.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

MOSES WILLIAMS & others, trustees, *vs.* INHABITANTS OF MILTON.

SAME *vs.* CITY OF WALTHAM.

SAME *vs.* INHABITANTS OF BROOKLINE.

SAME *vs.* CITY OF BOSTON.

Norfolk. Middlesex. Norfolk. Suffolk. November 21, 1912. — May 24, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Tax, Assessment. *Trust. Partnership.*

Where the beneficial interest in personal property held by trustees is in shareholders whose shares are represented by transferable certificates on which dividends are paid, the question, whether such property is to be assessed for taxation under St. 1909, c. 490, Part I, § 23, cl. 5, as "personal property held in trust" or under § 27 as personal property employed in the business of a partnership, depends on the powers and duties of the persons in whom the legal title is placed. If they have the control of the property for the benefit of the shareholders, the property is to be assessed to them as trustees, but if they are managing agents subject to the control of the shareholders, who are associated together to carry on business for their mutual profit, the property is partnership property and is to be taxed as such.

A certain "personal property trust" was created by an indenture of trust, under which the trustees named held property contributed by the holders of certificates of shares in the trust or bought with money contributed by them. The certificates, with a limitation of the right of sale, were transferable. The trustees were to invest and reinvest the fund and to pay the income to the

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certificate holders and on the termination of the trust were to divide the trust fund among the certificate holders. There was no provision for any meeting of the certificate holders. The only act which the indenture empowered the certificate holders to do was to consent individually to an alteration or amendment of the trust or to a termination of it before the time fixed by the indenture, when any one of these things should be proposed by the trustees. In carrying on the trust the trustees treated gains on changes of investments as additions to the trust fund and not as profits. The indenture declared that it created a trust and not a partnership and throughout that instrument the certificate holders were spoken of as "the *cestuis que trustent*." *Held*, that the instrument created an investment trust and not a partnership and that accordingly the personal property of the trust must be assessed for taxation under St. 1909, c. 490, Part I, § 23, cl. 5, and not under § 27.

FOUR PETITIONS to the Superior Court under St. 1909, c. 490, Part I, § 76, by the trustees of the Boston Personal Property Trust, in the first three cases appealing from refusals of the assessors respectively of the town of Milton, the city of Waltham and the town of Brookline to abate taxes assessed on April 1, 1911, on personal property held by the petitioners as such trustees alleged to be apportionable under St. 1909, c. 490, Part I, § 23, cl. 5, to beneficiaries or trustees whose places of residence were respectively in Milton, Waltham and Brookline, and in the fourth case appealing from a refusal of the assessors of the city of Boston to abate taxes upon the full amount of the personal property held by the petitioners as such trustees which were assessed to the petitioners on the same date under St. 1909, c. 490, Part I, § 27, on the ground that such property was the personal property of a partnership carried on in Boston.

The petitions were heard together by *Quinn*, J., upon an agreed statement of facts. In the cases against the town of Milton, the city of Waltham and the town of Brookline the judge found that the petitioners were entitled to the abatements respectively claimed in those cases and ordered that judgments should be entered accordingly, and in the case against the city of Boston he found that the petitioners were entitled to no abatement and ordered that judgment should be entered for the respondent. At the request of the parties he reported the cases for determination by this court.

The indenture of trust creating the Boston Personal Property Trust was dated January 10, 1893. Among other provisions bearing upon the character of the trust were the following:

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"Second. That the said Trustees shall hold all the funds and property (hereinafter called the Trust Fund), now or hereafter held by or paid to, or transferred or conveyed to them or their successors as Trustees hereunder in trust for the purposes, with the powers and subject to the limitations hereinafter declared, for the benefit of the *cestuis que trustent*, and it is hereby expressly declared that a trust, and not a partnership, is hereby created; that neither the Trustees nor the *cestuis que trustent* shall ever be personally liable hereunder as partners or otherwise, but that for all debts the Trustees shall be liable as such to the extent of the Trust Fund only. In all contracts or instruments creating liability, it shall be expressly stipulated that the *cestuis que trustent* shall not be liable."

"Fourth. (*a*) The Trustees shall have as full power and discretion, as if absolute owners, to invest and reinvest the Trust Fund (including any surplus and also income) in personal property, including bonds and notes or obligations secured upon real estate, and the decision of the Trustees as to what is personal property shall be final. They shall have the like power of investment in the purchase and improvement of real estate in the cities of the United States of America, for the purpose of leasing the same upon long terms, or ground rents so-called; and all real estate so purchased shall be conveyed to them in joint tenancy as Trustees hereunder."

"(*e*) The Trustees shall also have power at any time to borrow money, and to pledge, as collateral security for such loan, any personal property belonging to the Trust Fund, provided, however, that no loan shall be contracted for, so that the aggregate amount of such loans outstanding shall at such time exceed, in the judgment of the Trustees, twenty-five per cent. of the total amount of the personal property of the Trust Fund."

"Seventh. The Trustees shall declare dividends from the net income of the Trust Fund among the *cestuis que trustent* quarterly, or oftener, if convenient to the Trustees, and their decision as to amount of dividends, and as to using therefor any portion of the Surplus Fund, shall be final. They may set aside from time to time such portion of the net income as shall not be required for dividends for a Surplus Fund."

"Ninth. The Trustees shall render an account annually or

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oftener, if convenient to them, and shall, upon request, deliver or mail a copy to each *cestui que trust.*"

"Tenth. Any Trustee may resign his trust by a written instrument signed and sealed by him, and acknowledged in the manner prescribed for the acknowledgment of deeds, and such instrument may be recorded in the Registry of Deeds for the County of Suffolk, or deposited with such Depositary as the Trustees shall from time to time select.

"Any vacancy occurring from any cause at any time in the number of said Trustees shall be filled by the remaining Trustees. . . ."

"Fourteenth. The Trustees shall issue a certificate, in such form as they shall deem best, to each person who shall pay them the sum of one thousand dollars or multiple thereof, for an interest in the Trust Fund. But no certificate shall be issued for any less sum than one thousand dollars, at par value. . . ."

"Fifteenth. The interests represented by the certificates may be transferred on the books of the Trustees by the person named therein, or his legal representative, upon the surrender of the certificate, and a new certificate shall be issued to the transferee, who shall thereupon become a *cestui que trust.* But no such interest shall be sold until the holder thereof (including assignees in insolvency or bankruptcy, or for benefit of creditors, and holders by process of law or otherwise, except as hereinafter stated) shall have first in writing offered it for sale to the Trustees, who shall, as such Trustees, have the option for ten days after the receipt of such offer of buying the same at not more than the last preceding appraisal made by them, such appraisal to be made annually or oftener as they shall deem best. Interests so purchased by the Trustees may be held as part of the Trust Fund, or sold by them at their discretion.

"Devises by will, distribution of the estates of deceased persons according to law, and distribution of trust funds among those entitled thereto upon the termination of trusts, shall not be deemed sales for the purposes hereof."

"Twentieth. The Trustees may, with the consent of three-fourths in interest of the *cestuis que trustent,* alter or add to this Declaration, or terminate this Trust, and if it seems to them judicious so to do, they may, with like consent, convey the Trust

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Fund to new or other Trustees, or to a corporation, being first duly indemnified for any outstanding obligation or liability. . . . "

G. D. Burrage, for the petitioners.

F. Rackemann, for the town of Milton.

T. F. Kearns, for the city of Waltham, submitted a brief.

W. H. White, for the town of Brookline.

K. Adams, for the city of Boston.

LORING, J. These are four petitions for the abatement of taxes assessed upon the plaintiffs as trustees of the Boston Personal Property Trust. The Boston taxes were assessed on the theory that the property held by the plaintiffs under that trust was partnership property to be assessed under St. 1909, c. 490, Part I, § 27, in Boston where the partnership (if there was a partnership) had its place of business. The other taxes were assessed upon the theory that the property held by the plaintiffs under that trust was held by them as trust property the income of which was payable to another person and was to be assessed under St. 1909, c. 490, Part I, § 23, cl. 5.

It has been contended in effect if not in terms that, whatever may be its true character, the trust for the purposes of taxation was a partnership. Doubtless the Legislature might provide that a trust which was not a partnership should be treated as a partnership for the purposes of taxation. But it has not done so. What the Legislature has done is to provide (1) that "personal property held in trust by an executor, administrator or trustee, the income of which is payable to another person, shall be assessed to the executor, administrator or trustee in the city or town in which such other person resides, if within the Commonwealth," and if he resides out of the Commonwealth, in the place where the trustee resides; St. 1909, c. 490, Part I, § 23; and (2) that "Partners, whether residing in the same or in different cities or towns, may be jointly taxed under their firm name, in the place where their business is carried on, for all the personal property employed in such business, except ships or vessels." St. 1909, c. 490, Part I, § 27. That is to say, the Legislature has provided that the right to tax property as trust or as partnership property depends upon the real character of the property taxed. Under these enactments of the Legislature there is no room for holding that property which is in reality not partnership property can be

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taxed as partnership property. The right to tax property as trust or as partnership property depends upon what the character of the property taxed really is.

We proceed to a discussion of the principles on which the question of the true character of the Boston Personal Property Trust depends.

Where persons associate themselves together to carry on business for their mutual profit, they are none the less partners because (1) their shares in the partnership are represented by certificates which are transferable and transmissible, and because (2) as a matter of convenience (if not of necessity in case of transferable and transmissible certificates) the legal title to the partnership property is taken in the name of a third person. The person in whose name the partnership property stands in such a case is perhaps in a sense a trustee. But speaking with accuracy he is an agent who for the principal's convenience holds the legal title to the principal's property.

Several instances of such partnerships are to be found in our reports. In *Hoadley* v. *County Commissioners*, 105 Mass. 519, one Gordon McKay executed a declaration of trust by which he declared that he held his patents for sewing the soles of boots and shoes to the vamps, his factory where machines were manufactured under these patents and the whole business theretofore carried on by him, in trust for such persons as should buy certificates which were to be issued under that declaration of trust to the amount of fifty thousand in number, the proceeds to be used in carrying on the factory and business assigned to and held by the trustee. The certificate holders were to be known as the McKay Sewing Machine Association and the business was to be conducted by an executive committee to be chosen by them. This was held to create a partnership, and for that reason the shares were held not to be taxable to the holders of them. For a subsequent case involving the same association, where the same conclusion was reached, see *Gleason* v. *McKay*, 134 Mass. 419. In *Whitman* v. *Porter*, 107 Mass. 522, certain subscribers associated themselves together to buy a ferry boat to be run between Agawam and Springfield; the boat was to be conveyed to one of the subscribers in "trust" and the entire business was to be conducted by the trustees and their officers to be annually

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elected by the subscribers. The stock was assignable. These stockholders were held to be partners. In *Phillips* v. *Blatchford*, 137 Mass. 510, the money to carry on the business of manufacturing and selling grates was raised by the sale of transferable certificates issued under a somewhat similar declaration of trust which provided that the business should be carried on by a board of managers of whom the trustee was to be one, and the other members were to be elected by the shareholders. This also was held to be a partnership. In *Ricker* v. *American Loan & Trust Co.* 140 Mass. 346, the doctrine of these cases was extended to a case where the purpose of the association was to buy cars to be leased to a specified railroad. The persons providing the purchase money were to have transferable certificates, which certificates by the terms of the lease to the railroad were to be paid in ten annual instalments with six per cent interest until paid. The certificate holders were declared in the declaration of trust to be an association, and all the business was to be transacted by a board of managers to be elected by them. The property of the association was to be held by the American Loan and Trust Company as trustee. This also was held to be a partnership. *Williams* v. *Boston*, 208 Mass. 497, was a similar case. The trust agreeement in that case provided that the trust was established "for the purchase, development, and disposition of" the former site of the Museum of Fine Arts in Boston. The property was to be held by trustees, but the shareholders had a right to remove the trustees, and meetings of the shareholders were to be held at which the shareholders might authorize or instruct the trustees in any manner and alter or amend the declaration of trust, or direct the trustees to end the trust, sell the property and distribute the proceeds. The original papers in the case show these to have been the facts of the case although they are not stated in the report of that decision. The property of this association was held to be taxable as partnership property.

In *Mayo* v. *Moritz*, 151 Mass. 481, on the other hand, it was held that certificate holders under the declaration of trust there in question were not partners. In that case an inventor transferred his invention to trustees to whom by the terms of the trust indenture the patent was to be issued when it was issued. The trust indenture provided for the issue of scrip to those who

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should furnish to the trustees the money necessary for the more advantageous disposition of the invention. The trust, on which the trustees were to hold the invention and the money produced by the issue of scrip, was to hold, manage and dispose of the invention or any part thereof or interest therein upon such terms as to them (the trustees) or a majority of them should seem best, the net proceeds to be paid one half to the inventor and the other half to the holders of the scrip or certificates. The scrip, called in the trust indenture scrip or certificates, was transferable. Vacancies in the office of trustee were to be filled by the remaining trustees. It was held that the scrip-holders were not partners, and in that respect the case was "unlike *Gleason* v. *McKay*, 134 Mass. 419, and *Phillips* v. *Blatchford*, 137 Mass. 510."

The difference between *Hoadley* v. *County Commissioners*, 105 Mass. 519 (involving the same indenture as that in *Gleason* v. *McKay*, 134 Mass. 419), *Whitman* v. *Porter*, 107 Mass 522, *Phillips* v. *Blatchford*, 137 Mass. 510, *Ricker* v. *American Loan & Trust Co.* 140 Mass. 346, and *Williams* v. *Boston*, 208 Mass. 497, on the one hand, and *Mayo* v. *Moritz*, 151 Mass. 481, on the other hand, lies in the fact that in the former cases the certificate holders are associated together by the terms of the "trust" and are the principals whose instructions are to be obeyed by their agent who for their convenience holds the legal title to their property. The property is their property. They are the masters. While in *Mayo* v. *Moritz* on the other hand there is no association between the certificate holders. The property is the property of the trustees and the trustees are the masters. All that the certificate holders in *Mayo* v. *Moritz* had was a right to have the property managed by the trustees for their benefit. They had no right to manage it themselves nor to instruct the trustees how to manage it for them. As was said by C. Allen, J., in *Mayo* v. *Moritz*, 151 Mass. 481, 484: "The scrip-holders are *cestuis que trust*, and are entitled to their share of the avails of the property when the same is sold," and that is all to which they were entitled. In *Mayo* v. *Moritz* the scrip-holders had a common interest in the trust fund in the same sense that the members of a class of life tenants and the members of a class of remaindermen (among whom the income of a trust fund and the corpus are to be distributed respectively) have a common interest. But in *Mayo* v.

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Moritz there was no association among the certificate holders just as there is no association although a common interest among the life tenants or the remaindermen in an ordinary trust. For a decision in this Commonwealth somewhat like *Mayo* v. *Moritz*, *ubi supra*, see *Hussey* v. *Arnold*, 185 Mass. 202. See also in this connection *Makin* v. *Savings Institution at Portland*, 23 Maine, 350; *Burt* v. *Lathrop*, 52 Mich. 106.

There is a case in England (*Smith* v. *Anderson*, 15 Ch. D. 247) in which the distinction between cases like *Hoadley* v. *County Commissioners* and *Mayo* v. *Moritz*, was pointed out and established, and that case is now the established law in England. In *Smith* v. *Anderson* (decided by the Court of Appeals in 1880), the trust deed provided for the purchase by trustees of shares in the capital stock of eleven different submarine telegraph companies. The money was to be furnished by subscribers to whom transferable certificates were to be issued. The income derived from the submarine shares and the proceeds of any sales of them were to be applied by the trustees (1) in paying six per cent interest on the trust certificates issued under the trust; (2) in redeeming these trust certificates at £120; and finally, when (3) all the certificates had been redeemed, the surplus, if any, was to be divided among the former certificate holders. It was held that this was a trust and not a company association or partnership which had to be registered under companies act of 1862 (St. 25 & 26 Vict. c. 89), § 4. That act provided that "No company, association or partnership . . . shall be formed . . . for the purpose of carrying on any other business [that is to say, any business other than banking] that has for its object the acquisition of gain by the company, association, or partnership, or by the individual members thereof, unless it is registered." This conclusion was reached on the ground that there is a difference between a partnership where money raised by the issue of transferable certificates is to be held by so called trustees who are really managing agents, and a trust where money raised by the issue of transferable certificates is to be held by trustees properly so called, and that the distinction between the two is that which we have just stated in detail.

The decision in *Smith* v. *Anderson* is the law of England to-day, although by reason of some special facts in that case and the way

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in which the question arose doubts as to the conclusion reached in that case have been thrown out by two or three individual judges. For the subsequent cases see *Crowther* v. *Thorley*, 32 W. R. 330; *In re Siddall*, 29 Ch. D. 1; *In re Jones*, [1898] 2 Ch. 83, 91. For two cases where the distinction between managing agents who hold the legal title and trustees properly so called is reaffirmed, see *In re Thomas*, 14 Q. B. D. 379, 383; *In re Faure Electric Accumulator Co.* 40 Ch. D. 141, 151, 152.

This brings us to the question of the character of the Boston Personal Property Trust. It is plain that it is a trust and not a partnership. By the terms of the indenture of trust the property contributed by the certificate holders, or that bought with money contributed by them (the original trust property could be acquired in both ways by the terms of the indenture of trust), was to be held by the trustees in trust to pay the income to the holders of the certificates, and on the termination of the trust to divide the trust fund or the proceeds thereof among them. The certificate holders are throughout called "*cestuis que trustent.*" The certificate holders, or "*cestuis que trustent,*" are in no way associated together, nor is there any provision in the indenture of trust for any meeting to be held by them. The only act which (under the trust indenture) they can do is to consent to an alteration or amendment of the trust created by the indenture or to a termination of it before the time fixed in the deed. But they cannot force the trustees to make such alteration, amendment or termination. It is for the trustees to decide whether they will do any one of these things. All that the certificate holders or "*cestuis que trustent*" can do is to give or withhold their consent to the trustees taking such action. And the giving or withholding of consent by the *cestuis que trust* is not to be had in a meeting, but is to be given by them individually. As we have said, no meeting of the *cestuis que trust* for that or any other purpose is provided for in the trust indenture. The trustees of the Boston Personal Property Trust have a right to sell the trust securities and reinvest the proceeds, and also a limited power to borrow on the security of the trust property. The certificate holders, or "*cestuis que trustent,*" as they are called in the trust deed, have a common interest in precisely the same sense that the members of a class of life tenants (among whom the income of a trust

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fund is to be distributed) have a common interest, but they are not *socii*, and it is the trustees, not the certificate holders, who are the masters of the trust property. The sole right of the *cestuis que trust* is to have the property administered in their interest by the trustees, who are the masters, to receive income while the trust lasts, and their share of the corpus when the trust comes to an end.

It has been urged by the learned counsel for the city of Boston that these certificate holders or "*cestuis que trustent*" are in effect carrying on the business of buying and selling securities through the trustees as managing agents or directors, and he refers to two facts which (he argues) bear him out in that contention, namely, (1) that the trustees on April 1, 1911, had on hand undivided income to the amount of $51,516.93, and a "surplus capital" amounting to $488,566.35. By the terms of the trust the trustees are authorized to set aside from time to time such portion of the net income as shall not be required for dividends for a "Surplus Fund," which surplus fund may be subsequently used by them in their discretion in payment of dividends. It appears that the face value of the outstanding certificates is $2,090,500. The surplus fund of undivided income therefore amounts to about two and a half per cent of the corpus of the fund. The surplus capital of $488,566.35 is about twenty-three and one half per cent of the face value of the outstanding certificates. That is not an extraordinary increase in the value of the corpus of the trust fund during a period of eighteen years. But this contention brings out a fact in addition to those already referred to, which shows that the Boston Personal Property Trust is not a partnership, but a trust and nothing but a trust. When persons engage as partners in buying and selling stocks, bonds and other securities for their mutual profit, the gains made by purchases and sales are profits of the partnership, divisible as such among those entitled to the profits of the partnership. In case of a trust on the other hand, any gain made by a change of investments is an accretion belonging to the corpus of the trust fund and belongs to those who own the corpus of the fund. Such gains become part of the corpus as much as the original money contribution to the trust fund. On them the certificate holders, or "*cestuis que trustent*," are entitled to income while the trust lasts, and to their

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share of them (because they are included in the corpus of the trust fund) when the trust ends and there is a distribution of the corpus among the *cestuis que trust*. That is the way in which the trustees of the Boston Personal Property Trust have dealt with gains made by changes of investment of the securities of that trust. That is to say, the trustees have treated gains from sales of securities not as profits of a partnership organized to buy and sell stocks for a profit, but as gains on a change made in the investments of a trust fund.

It was largely with respect to the gains made by sales of the securities of the trust that the special circumstances in *Smith* v. *Anderson* raised a doubt as to that being a trust for investment and not a "business that has for its object the acquisition of gain." It was provided in the trust deed in *Smith* v. *Anderson* that the submarine telegraph shares should not be sold unless they brought a premium of thirty per cent, and that the proceeds of such sales should be used in the same way that the annual income derived from the submarine telegraph shares should be used, namely, in paying interest on the trust certificates and in retiring those certificates at £120 a share. They were issued originally at £90 per share. In that respect the trust in question in *Smith* v. *Anderson* was quite different from the Boston Personal Property Trust. There is nothing in the trust deed of the Boston Personal Property Trust which is in any way different from a trust under a will except that there are no limitations over and the interests of the *cestuis que trust* are represented by transferable and transmissable certificates.

Up to this time we have not alluded to the declaration in the indenture of trust here in question that it was the intention of the parties to it to create a trust and not a partnership. It is what the parties did in making the trust indenture that is decisive. If there had been doubt as to what they did, what they intended to do would have been a matter entitled to some consideration in determining what they did.

It was stated in a passing remark made by this court in *Williams* v. *Johnson*, 208 Mass. 544, 552, that in the trust before the court in that case the certificate holders were partners within the meaning of that word in St. 1909, c. 490, Part I, § 27. While that trust provided for meetings of the shareholders and in that

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respect for some association of and among them, an examination of the original papers shows that it was a trust and not a partnership. This remark was in no way essential to the decision in *Williams* v. *Johnson*.

In the Boston Personal Property Trust the property is the property of the trustees, to be managed for the benefit of the certificate holders but to be managed by the trustees and not by the certificate holders. There is no association of or among the certificate holders. The rights of the certificate holders are limited to each receiving his share of the income of the trust investments during the continuance of the trust and his share of the corpus of the trust when the trust comes to an end. It is in every respect an investment trust and nothing more.

It follows (1) that the property held by the plaintiffs as trustees of the Boston Personal Property Trust was not taxable as partnership property, and that in the petition brought by them against the city of Boston they are entitled to an abatement; and (2) that their property was taxable as property held in trust the income of which was payable to another, and the taxes assessed by the assessors of the city of Waltham and by the assessors of the Inhabitants of Milton and of Brookline were properly assessed; and that the petitions against those municipalities should be dismissed. It is

So ordered.

M. SUMNER COGGAN, trustee, *vs.* ALVA N. WARD & another.

Middlesex. December 2, 1912. — May 24, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & DE COURCY, JJ.

Bankruptcy. Mortgage, Of personal property. *Bill of Sale.*

If a mortagee of personal property under an unrecorded instrument of transfer absolute in form, which was executed and delivered in good faith more than four months before the filing by the mortgagor of a voluntary petition in bankruptcy, takes possession of the mortgaged property less than one month before the filing of such a petition when he has reasonable cause to believe that the mortgagor is insolvent, such mortgagee, where no intervening liens or rights have been obtained, acquires a title which is good under the law of this Commonwealth and consequently is good under the bankruptcy act of 1898, as

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amended by U. S. St. 1903, c. 487, § 13, against the trustee in bankruptcy of the mortgagor, unless the instrument of transfer was one that was required by law to be recorded or registered.

Before the enactment of St. 1913, c. 656, a mortgage of personal property made by a bill of sale absolute in form but intended as security for the payment of money was not required by R. L. c. 198, § 1, to be recorded, and consequently was not included in the provision of the bankruptcy act as amended by U. S. St. 1903, c. 487, § 13, that the period within which a transfer may constitute a preference "shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required."

RUGG, C. J. This is a bill in equity brought by the trustee in bankruptcy of the defendant Cross, to recover as assets of the bankrupt certain chattels in the possession of the defendant Ward, alleged to have been conveyed to him by the bankrupt contrary to the United States bankruptcy act.* The facts are that Cross, the bankrupt, in October, 1907, executed and delivered to Ward a bill of sale of all his livery stable property, absolute in form but intended as security for the payment of $3,000 then lent by Ward to the bankrupt. This instrument of transfer was never recorded. Ward contemporaneously gave to the bankrupt an authorization to continue to use the property in the livery stable business. This transaction was executed by both parties in good faith, and there was no evidence that Cross was insolvent at that time. On December 31, 1908, Ward took possession of the property under his instrument, then having reasonable cause to believe that Cross was insolvent, not intending to perpetrate any actual fraud, but merely to perfect his lien upon the property, and to make it available for the payment of his debt before attachment or bankruptcy. On January 19, 1909, Cross filed a voluntary petition in bankruptcy, and was adjudged a bankrupt.

The first question is, what were the rights of the parties under these circumstances, apart from the federal bankruptcy act. It is the settled law of this Commonwealth that an instrument of transfer of personal property, absolute in form but intended by the parties to be a mortgage, genuine, honest and valid as such when executed and delivered, authorizes the person named as vendee to take possession of the property, in order to secure his own debt, at any time before the rights of other persons have

* In the Superior Court *Jenney*, J., made a final decree dismissing the bill; and the plaintiff appealed.

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intervened, and that thereby he acquires a title which relates back for its validity to the date of the instrument, and that, although the taking possession may be at a time when the debtor is insolvent to the knowledge of himself and of his creditor named as vendee in the instrument of transfer, it is nevertheless effectual, although occurring within a period of time previous to insolvency, which would invalidate the transaction if the initial step had occurred at the time of taking possession. This was decided in *Mitchell* v. *Black*, 6 Gray, 100. That case frequently has been cited with approval and its principle affirmed. *Blanchard* v. *Cook*, 144 Mass. 207, 227. *Wright* v. *Tetlow*, 99 Mass. 397, 400. *Chase* v. *Denny*, 130 Mass. 566, 569. *Sawyer* v. *Turpin*, 91 U. S. 114. *Humphrey* v. *Tatman*, 198 U. S. 91. See *Haskell* v. *Merrill*, 179 Mass. 120; *In re Antigo Screen Door Co.* 59 C. C. A. 248, 255. It was decided in *Tatman* v. *Humphrey*, 184 Mass. 361, that acquisition of possession of mortgaged personal property by a mortgagee acting under an unrecorded mortgage within a few days before the commencement of bankruptcy proceedings and before third persons had acquired liens or rights by attachment, conferred upon the mortgagee a title good at common law against creditors, and which would have been good against an assignee in insolvency under our statutes. This rule was held to apply under the bankruptcy act in *Humphrey* v. *Tatman*, 198 U. S. 91. This is so, notwithstanding and under the provisions of R. L. c. 198, § 1, to the effect that mortgages of personal property should be recorded within fifteen days from the date written in the mortgage, and shall be void if recorded subsequently, "unless the property mortgaged has been delivered to and retained by the mortgagee." The decisions relied upon by the plaintiff, the trustee in bankruptcy, are distinguishable. *Walker* v. *Staples*, 5 Allen, 34, *Thompson* v. *Dolliver*, 132 Mass. 103, and *Copeland* v. *Barnes*, 147 Mass. 388, were all cases where a bill of sale was given without any change of possession, either then or at any subsequent time, and it was said that the instrument was at most a pledge, and that, no possession having been taken under it before the rights of other parties had accrued, no substantial rights had been secured under the pledge. These cases plainly are different from the present, where it is expressly found that the parties intended the instrument to operate as a mortgage, and the vendee named

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in the bill of sale has perfected his rights as mortgagee by taking possession of the property before bankruptcy.

The second question presented is the effect of the transaction in the light of the federal bankruptcy act. It was said in *York Manuf. Co.* v. *Cassell*, 201 U. S. 344, at 349, with affluent citation of authorities: "The trustee in bankruptcy takes no greater title than the bankrupt and the bankruptcy proceedings do not operate as a judicial seizure, conferring new and greater rights on the creditors of the bankrupt." To the same effect see *Zartman* v. *First National Bank of Waterloo*, 216 U. S. 134, 138; *Sexton* v. *Kessler & Co.* 225 U. S. 90, 97; *Holt* v. *Crucible Steel Co. of America*, 224 U. S. 262; *Thomas* v. *Taggart*, 209 U. S. 385.

It is the law under the present federal bankruptcy act, as established by decisions of the United States Supreme Court, that the effect of taking possession of property within four months of the bankruptcy by a mortgagee according to the terms of the mortgage made earlier than four months before the filing of the petition in bankruptcy is to be determined according to the law of the State. *Thompson* v. *Fairbanks*, 196 U. S. 516. This continues to be the law, except as modified by 32 U. S. Sts. at Large, 797, 799; U. S. St. 1903, c. 487, § 13, approved February 5, which provides that "where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required."

The point next to be determined is whether the instrument of transfer here under consideration was one required to be recorded or registered under the law of this Commonwealth. It is true that in general mortgages of personal property are required by R. L. c. 198, § 1, to be recorded. But a bill of sale is not a mortgage. It has been decided several times that it was not only not a mortgage, but could not be recorded as a mortgage and acquired no additional validity by being recorded. *Williams* v. *Nichols*, 121 Mass. 435. *Hill* v. *Marston*, 178 Mass. 285. *Harding* v. *Eldridge*, 186 Mass. 39. *Clark* v. *Williams*, 190 Mass. 219. The reason for this is that the mortgage agreement in cases like the present is partly oral, and therefore cannot be recorded. It is not required to be recorded under the law of this Commonwealth, and its validity does not depend on such recording, and

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is in no way affected by it. The change wrought by St. 1913, c. 656, does not affect the rights of the present parties. The facts presented by the case at bar, therefore, do not come within the purview of the bankruptcy act as amended by U. S. St. 1903, c. 487, § 13. The bill of sale with its accompanying oral agreement constituted a mortgage of personal property valid under the laws of this Commonwealth, and not required to be or capable of being registered or recorded as such. Possession taken under it before the filing of the petition in bankruptcy and before the right of other persons had attached, so far as the law of this Commonwealth is concerned, vested title in the mortgagee. It has the same effect under the bankruptcy law.

The United States Circuit Courts of Appeal generally have sustained the validity of an instrument of transfer which was valid without recording as between the parties and against attaching creditors under the State law since the enactment of 32 U. S. Sts. at Large, 797, 799; U. S. St. 1903, c. 487. *Meyer Bros. Drug Co.* v. *Pipkin Drug Co.* 69 C. C. A. 240, *In re Doran,* 83 C. C. A. 265, *In re Sturtevant,* 110 C. C. A. 68, *In re Klein,* 116 C. C. A. 603, 613, although there are contrary decisions: *In re Beckhaus,* 100 C. C. A. 561, *Loeser* v. *Savings Deposit Bank & Trust Co.* 78 C. C. A. 597. Other decisions sustaining the conclusion we have reached are *Mower* v. *McCarthy,* 79 Vt. 142, *Laurel Oil & Fertilizer Co.* v. *Horne,* 101 Miss. 629. See also *Fisher* v. *Zollinger,* 79 C. C. A. 76.

Decree affirmed with costs.

L. C. Coggan, for the plaintiff.

A. H. Wellman, (*H. W. King* with him,) for the defendants.

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HANNAH E. PIERCE, administratrix, *vs.* STATE NATIONAL BANK OF BOSTON.

Suffolk. December 2, 3, 1912.—May 24, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & DE COURCY, JJ.

Bills and Notes, Certificate of deposit. *Bank. Limitations, Statute of.*

The time within which a certificate of deposit (using that term in its proper sense) should be returned to the bank which issued it and a demand for its payment should be made is the time limited for the bringing of an action upon it against the bank.

Whether the time within which an action upon a certificate of deposit (using that term in its proper sense) should be brought against the bank which issued it is twenty years, as prescribed by R. L. c. 202, § 1, cl. 2, with regard to "actions upon bills, notes and other evidences of indebtedness issued by a bank," or six years, as prescribed by § 2 with regard to actions of contract other than those upon judgments and those described in § 1, was not decided in this suit in equity to collect the amount of such a certificate, where no demand for payment of the certificate was made until thirty-six years after its date.

LORING, J. This is a suit in equity * to collect the amount of a certificate of deposit issued in 1859, on which a demand for payment was made thirty-six years later (to wit, on November 27, 1895), but not before, and where the suit to collect was begun forty-seven years later (March 7, 1906). The present suit had its origin in a writ dated March 7, 1906, which by leave of court was amended into this bill in equity. It is based on the claim that the State bank which issued the certificate (by name the Hide and Leather Bank) was reorganized under the same name as a United States bank (and so liable for the debts of the State bank under the rule applied in *Atlantic National Bank* v. *Harris*, 118 Mass. 147) and that later the National Hide and Leather Bank became consolidated with the defendant bank on terms which made that bank liable for its debts.

The certificate is in the following words: "Certificate of Deposit. $1324. Boston, July 19, 1859. Jacob Chase, Esq., has deposited in the Hide and Leather Bank Thirteen hundred twenty four $\frac{00}{100}$

* Brought by a bill filed in the Superior Court on March 19, 1912, and reserved and reported by *Jenney*, J., for determination by this court.

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Dollars payable, on the return of this certificate, to his order endorsed on the same. [Signed] J. S. March, Cashier." The word "Original" appeared printed or written across the face of the certificate.

It was decided in *Shute* v. *Pacific National Bank*, 136 Mass. 487, that, while a certificate of deposit has for the most part the incidents of a promissory note, it differs from a promissory note payable on demand in at least one respect, namely: It is not overdue until after a demand for payment is made and so it is not subject in the hands of a subsequent holder to a set-off of notes due from the original payee under Gen. Sts. c. 53, § 10. For subsequent cases as to certificates of deposit see *Hunt, appellant*, 141 Mass. 515; *Schmidt* v. *People's National Bank*, 153 Mass. 550.

The purpose and use of certificates of deposit (using that term in the proper sense) is to transmit funds and make payments. In this respect certificates of deposit are like certified checks. See for example *Merchants' Bank* v. *State Bank*, 10 Wall. 604, 648, where the two are classed together. An example may be found in a case where a person has occasion to make a payment in his own city or town or to transmit funds to another city or to another country. He does not want to carry or send gold or notes which are a legal tender. Again, he cannot expect his own check to be taken in payment. Under these circumstances he deposits in a bank the sum to be paid or transmitted and procures a certificate of deposit (in the form set forth above), or he draws his check and procures it to be certified by the bank or he procures a cashier's check on a bank in the place where the payment is to be made. Then by indorsing the certificate of deposit the certified check or the cashier's check to the person to whom he wishes to make the payment or transmit the money, he effects his object with ease and safety. It is apparent from this that the function performed by a certificate of deposit is one which contemplates a presentation of it for payment within a short time. The bank has the use of the money deposited so long as the certificate is outstanding, while the person who holds the certificate gets no interest on the sum it represents. The general rule, therefore, is applicable, namely, that the time within which a demand must be made is the time limited for bringing an action. *Campbell* v. *Whoriskey*, 170

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Mass. 63, 67. *Downer* v. *Squire*, 186 Mass. 189. *Whitney* v. *Cheshire Railroad*, 210 Mass. 263. The plaintiff has contended that the period of limitation applicable to a certificate of deposit issued by a bank is fixed by R. L. c. 202, § 1, at twenty years and not by R. L. c. 202, § 2, at six years. It is not necessary to decide whether this be so or not; no demand was made until thirty-six years after the date of the certificate; in either event the demand was too late.

There are to be found in the books instances where instruments have been issued in the form of certificates of deposit payable on demand, which serve a different purpose and are subject to a different rule. These are certificates which are issued for money borrowed and which carry interest. An instance is to be found in *McGough* v. *Jamison*, 107 Penn. St. 336. There the deposit was made in "Parker's Savings Bank" and a certificate like the certificate here in question was issued which bore interest at five per cent "if left six months." The purpose of a negotiable receipt for money borrowed is a continuing loan of money. Although the paper issued in that and similar instances is in its terms like a certificate of deposit, it is, speaking with accuracy, a negotiable receipt for money borrowed and not a certificate of deposit. The transaction is in substance the same as that in *Campbell* v. *Whoriskey*, *ubi supra*, and the result to be reached is not affected by the fact that the person with whom the deposit was made as an investment issued a negotiable receipt payable with interest in place of a non-negotiable one as was done in *Campbell* v. *Whoriskey*. For these reasons the same conclusion was reached in *McGough* v. *Jamison* that was reached in *Campbell* v. *Whoriskey*, namely, that the general rule did not apply and consequently that it was not necessary to make a demand within the statutory period for bringing an action. *Finkbone's appeal*, 86 Penn. St. 368, on the authority of which *McGough* v. *Jamison* was decided was in substance a similar case.

It follows that the bill must be dismissed with costs.

So ordered.

E. B. Jackson, for the plaintiff.

E. G. McInnes, (*H. M. Aldrich* with him,) for the defendant.

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HARRIET B. BISBEE, executrix, *vs.* JOSEPH A. MACKAY & others, trustees.

Suffolk. December 4, 1912.—May 24, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & DE COURCY, JJ.

Trust, Enforcement against succeeding holder of real estate. *Notice. Equity Jurisdiction*, To enforce trust, Laches.

One, who held real estate subject to a trust created by a contract in writing between him and an investor who had advanced the money for its purchase, the terms of the trust among other things providing for the repayment to the investor of the money advanced by him, conveyed it without consideration through a conduit to himself and two others as trustees under a recorded declaration of trust providing for the issue of certificates of shares to those who should invest in the enterprise and for the selection and qualification of trustees to fill vacancies caused by death or resignation. The recorded declaration contained nothing with regard to the original investor's rights and the original trustee did not inform his new associates of them. Shortly after the conveyance the original trustee wrote to the investor stating that the conveyance did not affect his rights. All of the trustees later resigned and successors were appointed under the terms of the trust instrument. About a year and seven months after the conveyance by the original trustee, the investor by a suit in equity against the new trustees sought to enforce in his favor a trust as to the land which they still held. *Held*, that, because the original trustee knew of the trust in favor of the plaintiff, his first associates in the real estate trust and their successors, the defendants, none of whom had paid any consideration for the real estate, also received it subject to the same trust. *Held, also*, that the holders of shares in the real estate trust stood in no better position than the trustees. *Held, also*, that the plaintiff was not guilty of laches.

BILL IN EQUITY, filed in the Supreme Judicial Court on November 5, 1910, by William A. Bisbee (hereinafter called the plaintiff) against Joseph E. Barlow, and Joseph A. Mackay, James Reid Hyde and Wilfrid Bovey "as they are trustees of the Commonwealth Avenue Trust," to establish in the plaintiff's favor, as to certain land held by the defendant trustees, a trust which was set out in an unrecorded contract in writing between the plaintiff and the defendant Barlow, who formerly had held the legal title to the land and who had conveyed it through a conduit to himself and two others as trustees of the Commonwealth Avenue Trust under a recorded agreement in writing which made no mention of

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the trust in the plaintiff's favor. The defendant trustees were successors of the original trustees by appointment under the terms of the trust.

William A. Bisbee died while the suit was pending and Harriet B. Bisbee, the executrix of his will, was allowed to appear and prosecute the suit.

On the plaintiff's motion, the bill was dismissed as to the defendant Barlow.

There was an agreed statement of facts. The material facts are stated in the opinion. The agreed statement of facts contained a stipulation that, if the plaintiff was entitled to impress the land with a trust on account of the contract between Barlow and Bisbee, or to enforce such contract against the defendant trustees in equity, a decree should be entered ordering the trustees to pay out of such trust, but not as individuals, the sum of $2,500, with interest at six per cent from November 30, 1908, without costs; and that otherwise the bill should be dismissed against the trustees without costs.

The case was reserved by *Sheldon*, J., for determination by the full court.

R. W. Hale, (*J. M. Maguire* with him,) for the plaintiff.

W. A. Quigley, for the defendants.

RUGG, C. J. The plaintiff by this bill seeks to establish a trust for his benefit in lands now held by the defendants under a recorded declaration of trust. The material facts are these: In October, 1908, William A. Bisbee and Joseph E. Barlow entered into a written agreement for the purchase of land for their joint account. The plaintiff furnished $2,500, which appears to have been all the money put into the transaction at that time. The title was to be taken in the name of Barlow, who was to have the active management of the venture and sell the estate for the benefit of both. The plaintiff was to have a one half interest, subject to certain deductions for expenses, and the net proceeds were first to be applied to the repayment with interest of the $2,500 furnished by the plaintiff. By subsequent written agreement another tract of land was substituted for the one first described. These agreements were never recorded.

It is plain upon familiar principles that the transactions up to this point raised a trust in favor of Bisbee, and that Barlow held

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the title charged with the fiduciary duty to carry out the terms of the agreement. *Baylies* v. *Payson*, 5 Allen, 473, 488.

Barlow failed in essential particulars to perform his part of the contract. On April 13, 1909, he conveyed this tract of land, together with others standing in his name, to one Roche, who was a mere conduit of title, and who in turn at the same time conveyed it to Barlow, William P. Everts and Sidney F. Hooper as trustees under a real estate trust agreement and declaration of trust similar in terms to those under consideration in *Williams* v. *Boston*, 208 Mass. 497, and *Ricker* v. *American Loan & Trust Co.* 140 Mass. 346. The interest of the real owners was represented by certificates of fractional parts called shares. No value was given for this conveyance from Barlow through the conduit to the trustees, of whom Barlow was one, and all the shares were issued by the trustees to Barlow as payment for the land which he conveyed to them in trust. Barlow did not inform Roche, Everts and Hooper of his contract with Bisbee, and none of them had any knowledge of it. But of course he knew about it himself.

Such a conveyance was not to an innocent purchaser for value. It did not have the effect of extinguishing the equitable rights of Bisbee. No consideration was paid in fact. The devices of trustees, a declaration of trust and shares with the powers here vested in the shareholders constituted the association copartners. But, treating those named as trustees as trustees in the strict sense, they were under the circumstances here disclosed affected with the knowledge of Barlow. Shortly after this conveyance Barlow wrote to Bisbee that he deeded the land in trust "with the understanding that one half the profits, when sold, should go to you after refunding you the $2,500 that was due you." Knowledge of Barlow affected the trustees holding the property with the continuance of the trust in favor of Bisbee. *Freeman* v. *Laing*, [1899] 2 Ch. 355, 359.

No change was wrought in this respect by the resignation of the three original trustees and the substitution of the present defendants. There was no new conveyance. They took the legal title, according to the terms of the trust declaration, by selection and qualification. There was no new consideration. They took the same estate held by their predecessors charged with the same infirmities. The notice given to their predecessors in this regard

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affected them. It was not essential to the preservation of the rights of Bisbee that a new notice should be given to each successive trustee as he came into the trust. *Smith* v. *Smith*, 2 C. & M. 231. *Phipps* v. *Lovegrove*, 16 Eq. 80. *Ward* v. *Duncombe*, [1893] A. C. 369. This is not an instance of an innocent purchaser for value relying upon the registry of deeds for his title. That principle is inapplicable to the circumstances of this case.

Those who have become purchasers of the shares from Barlow and their successors are not in the position of purchasers of real estate for value without notice. They can stand in no better position in this regard than the trustees. The evidence of interest in the trust being a certificate, which in form of transfer resembles personal property, purchasers for value do not stand on the same footing as purchasers of real estate by deed in reliance upon the record. It is subject in this regard to the infirmities of transfers of personal property.

The statute of frauds is inapplicable to the facts here presented. The original agreement was in writing. The plaintiff's rights rest upon that and are sustained by it throughout.

There is nothing in the record to warrant a finding of laches on the part of the plaintiff.

In accordance with the terms of the stipulation a decree may be entered ordering the defendant trustees to pay out of the trust, but not as individuals, the sum of $2,500 with interest at six per cent from November, 1908, without costs.

So ordered.

WALDO R. CUTTER *vs.* EDWARD H. CUTTER & another.

Middlesex. December 4, 1912.—May 24, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & DE COURCY, JJ.

Estoppel. Partition.

Where, after the death intestate of the owner of several parcels of real estate, a son of the intestate files and prosecutes in the Probate Court a petition for the partition of the real estate among the heirs, and in the course of the proceedings before commissioners appointed to make the partition makes no claim to a barn upon one of the parcels of land which he has a right to remove as

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personal property, and, by reason of his making no such claim, the commissioners make a decree, to which he assents, setting off the parcel upon which the barn stands and the barn and other buildings thereon to another of the heirs and assigning a separate value to the land and to the buildings as real estate, such son thereafter is estopped, as against the heir to whom such parcel was set off, to deny that the barn is a part of the real estate and passed under the decree of partition.

LORING, J. This is a bill in equity to enjoin the defendants from removing from the plaintiff's land a barn which the defendants contend was personal property by force of the agreement under which it was built.

The barn was built in 1891 by three sons of Cyrus H. Cutter. Cyrus H. Cutter then owned the land on which the barn was built, and he gave to these three sons, who were partners in market gardening, a right to occupy his land in consideration of their paying the taxes on it and taking care of him and his wife so long as they lived. As we construe his findings, the judge who heard the case* did not find it necessary to decide whether the agreement under which the barn was built did or did not make it personal property. The three sons who were partners were George, who died in 1898, Charles, who died in 1909, and the defendant Edward H. Cutter. The plaintiff was a fourth son who was in the west when the barn was built. About a year after Charles died the defendant Edward Cutter brought a petition for partition of the land of the father.. The commissioners appointed to make partition set off to the plaintiff in this suit *inter alia* a lot known as the "Cutter Homestead." The "Cutter Homestead" was the land on which the barn here in question stood, together with other buildings. It is described by the commissioners as "containing fifteen (15) acres, thirty nine (39) rods more or less," and was appraised by them "for the sum of fourteen thousand dollars (land ten thousand six hundred dollars and buildings thrity [*sic*] four hundred)." The judge made these findings: "In the course of the hearings had upon the said petition no claim was made by Edward H. Cutter that this building was personal estate or belonged to the partnership. The commissioners therefore appraised it as real estate, and made a decree as to the value of such real estate in accordance with the situation as disclosed by the evidence

* *Hardy*, J. A final decree was entered granting the injunction sought by the plaintiff, and the defendants appealed.

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and with reference to the fact that no claim was made that it was personal estate." "The decree of partition was assented to by the respondent Edward H. Cutter." "Although I can find upon the evidence in this case that this was originally considered as personal property and might have been removed from the premises without serious or irreparable injury to the estate, yet I find upon all the evidence that Edward H. Cutter was estopped by his conduct in connection with the original appraisal of the estate of Charles H. Cutter,* as well as by his silence in connection with the partition of the real estate of Cyrus H. Cutter, last referred to, from making any claim to the building in question."

As we interpret this finding the judge who heard the case did not find it necessary (as we have already said) to decide whether the agreement under which the barn was erected provided that it should be personal property because he made the findings above set forth. One of the commissioners to make partition testified that the defendant Edward H. Cutter was present at the hearings of the commissioners and that there was a discussion at these hearings as to the buildings on the "Cutter Homestead" lot and the value of them, and that there was no suggestion that any building on that lot was personal property.

After an examination of the evidence on which the case was decided we affirm the finding as to an estoppel arising out of the partition proceedings.

It is not necessary to consider the other questions argued.

The result is that the decree must be affirmed with costs.

So ordered.

J. Cummings, for the defendants.

W. R. Buckminster, (*A. J. Wellington* with him,) for the plaintiff.

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* The judge's finding regarding conduct of the defendant Edward H. Cutter as to the appraisal of the estate of his brother and former partner, Charles H., was as follows: "In the course of the administration of the estate of Charles, above named, the appraisers attempted to assess the value of the personal estate belonging to Charles and connected with such partnership. In the course of said appraisal no claim was made by Edward H. Cutter, although he was present at some meeting or meetings of the appraisers in connection with the same, that this building in question was a part of the personal estate of Charles Cutter, and no such claim was made by him in any manner, although the inquiry was made of him as to whether there was any other personal property other than that which the appraisers acted upon."

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SUPREME LODGE OF THE PORTUGUESE FRATERNITY OF THE UNITED STATES *vs.* LIBERTY TRUST COMPANY & another.

Suffolk. December 6, 1912.—May 24, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & DE COURCY, JJ.

Equity Jurisdiction, To follow trust fund. *Trust. Equity Pleading and Practice,* Appeal.

The treasurer of a subordinate lodge of a fraternal beneficiary corporation deposited funds which he received by virtue of his office in a bank account in his own name in which also were mingled moneys received by him from various other sources. His successor as treasurer being elected, he admitted to the secretary of the corporation as well as to his successor that the funds of the lodge were in the bank account and stated that he stood ready to deliver them to his successor, but he died before he could do so. At the hearing of a suit in equity by the corporation against the executrix of his will to impress the fund with a trust in its favor and to compel its transfer, it appeared that, by a mistake of the treasurer his account at the bank had been overdrawn about three months before the election of his successor, but that "as soon as it was discovered that he had made the mistake the amount was paid by him to the" bank, and that thereafter he had on deposit at the bank a sum of money in excess of the fund claimed by the plaintiff. A final decree was entered for the plaintiff. *Held,* that the overdraft did not act as a dissipation of the fund, and that the decree was justified.

Where, in a suit in equity the final decree awards to the plaintiff a certain sum claimed by him but awards him no interest, on an appeal by the defendant alone, the question, whether the plaintiff should have been awarded interest, is not before this court.

BILL IN EQUITY, filed in the Superior Court on February 14, 1911, to impress with a trust in favor of the plaintiff a fund of $1,137.27 on deposit in the defendant trust company to the credit of the estate of one Manuel J. DeAvellar, the executrix of whose will also was a defendant, and to compel a transfer of the fund to the plaintiff, it being alleged in the bill that the fund had been held by DeAvellar as funds of the plaintiff.

In the Superior Court the case was heard by *Hardy,* J., who filed a memorandum of his findings to the effect that the deposit of DeAvellar with the defendant trust company was in his name as an individual, that therein were mingled with his own funds money received by him as the treasurer of a subordinate lodge of

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the plaintiff as well as money received by him from various other sources, and that DeAvellar had acknowledged to the proper officer of the plaintiff, at regular examinations of his accounts as treasurer, "that he had funds in his possession for which he should account to the plaintiff," and, on the election of his successor in December, 1910, had offered to give a check to the plaintiff's secretary, and was prepared to do so but had been told that he had better give it to his successor; that on December 27, 1910, he had told his successor that he was ready to give him a check on the defendant trust company for the lodge's funds there deposited, or to go with him to the bank of that defendant and transfer the deposit. DeAvellar died on January 1, 1911. The judge's finding on this subject concluded as follows:

"I find from the statement he made to the secretary of the Supreme Lodge, as well as to his successor, that there was such an appropriation of the funds in his hands for the benefit of the plaintiff; that he made a declaration of trust that the fund which was held by him in the Liberty Trust Company was the fund belonging to the Supreme Lodge."

The judge's entire finding as to the overdraft by DeAvellar, mentioned in the opinion, was as follows: "It appears that on October 25, 1910, by reason of a mistake in the subtraction of the sum of a previous check from his balance on hand, he overdrew his account, that is, that he felt on that day he had a balance to his credit of $1,000 in excess of the amount which he actually had. This resulted in there being an overdraft upon his account of about $100 or more upon that date. As soon as it was discovered that he had made this mistake the amount was paid by him to the company, and from that time until the day of his death there was deposited by him in his various capacities above described an amount of money in excess of $13,000 to his credit in the Liberty Trust Company."

Other material facts are stated in the opinion.

A final decree was entered as prayed for in the bill. The defendant executrix appealed.

J. J. Cummings, for the defendant executrix.

J. E. Kelley, for the plaintiff.

LORING, J. This is a bill in equity brought by a fraternal beneficiary corporation to compel the transfer to it of $1,137.27. The

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defendants are the executrix of the will of Manuel J. DeAvellar and a trust company in which DeAvellar during his lifetime had a deposit account in his own name. The bill is based upon the theory that this $1,137.27 was the amount of trust moneys belonging to the plaintiff which it can in fact trace to the deposit account under the doctrine fully explained in *Hewitt* v. *Hayes*, 205 Mass. 356. The judge found for the plaintiff, and the case comes before us on his findings without the evidence on which they were made.

It appears that DeAvellar died on January 1, 1911, and that on October 25, 1910, he overdrew the deposit account in question through a mistake in subtraction in figuring out the amount then on deposit. But the judge found that "as soon as it was discovered that he had made the mistake the amount was paid by him to the company," and that "there was an intention on his part to replace it, which he had a right to do." We interpret this to be a finding that DeAvellar immediately corrected this mistake and deposited to the credit of this account such sum as was necessary to leave in this account the plaintiff's money intact which up to this time had been in this account untouched. This did not act as a dissipation of the trust fund. On that point *Perkins* v. *Perkins*, 134 Mass. 441, is decisive.

The defendant has argued that DeAvellar had no right to correct this mistake because he was insolvent at the time. As to that it is enough to say that it does not appear that he was insolvent at that time. In fact there is no finding that he was insolvent at any time.

The other contentions argued by the defendant are concluded by the findings of the judge which in the absence of the evidence on which they were made are final.

The plaintiff has asked that the decree be modified so as to give it interest on its money. But the only appeal taken from the decree was taken by DeAvellar's executrix. Whether the decree ought to have given the plaintiff interest is not before us.

The decree must be affirmed with costs to be paid by the executrix.

So ordered.

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ANNIE W. STEVENS & others *vs.* ANDREW W. BAKER.

Norfolk. December 6, 1912.—May 24, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Limitations, Statute of. Equity Pleading and Practice, Appeal.

One who, after having acted as an agent in charge of real estate of a certain person, continues in charge of it for such person's heirs, and whose claim for services against the ancestor has become barred by the statute of limitations, has no right to deduct the amount of the claim so barred from rents collected from the real estate which have come into his possession while acting as agent for the heirs.

Where in a suit in equity the defendant alone appeals from a final decree and the only error which appears upon the record is the awarding of too small a sum to the plaintiff, the decree must be affirmed.

BILL IN EQUITY, filed in the Superior Court on January 7, 1910, for an accounting by the defendant as the agent in charge of certain real estate of the plaintiffs.

The case was referred to Oscar A. Marden, Esquire, as master. The material facts are stated in the opinion. After a hearing by *Fessenden,* J., a decree was made for the plaintiffs; and the defendant appealed.

The case was submitted on briefs.

A. P. Worthen, for the defendant.

A. T. Johnson & M. S. Case, for the plaintiffs.

LORING, J. The only question presented in this case is whether the defendant has the right to pay himself out of rents of the plaintiffs' real estate (collected by him as their agent) the sum of $733.18 due to him from the plaintiffs' ancestor in title, who died intestate, for collecting rents of the same real estate while she was the owner of it. The defendant's claim against the estate of the intestate is barred by the statute of limitations. The defendant having lost his right to collect the debt due him from the intestate now seeks to recoup his loss by taking the amount of it out of income of the property of the intestate's heirs. And he seeks to

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justify this by suggesting that if he had collected his debt from the intestate's estate the property which came from her to the heirs would have been diminished by the amount of it. Were that a justification, a debt barred by the statute of limitations always could be collected from the debtor.

There appears to be an error of $36.23 against the plaintiffs in the amount carried forward as the corrected balance of the second account. But no appeal was taken by them and the entry must be

Decree affirmed with costs.

CHARLES H. W. FOSTER & others, trustees, *vs.* CITY OF BOSTON.

SAME *vs.* INHABITANTS OF BROOKLINE.

SAME *vs.* INHABITANTS OF MILTON.

SAME *vs.* INHABITANTS OF WESTWOOD.

Suffolk. Norfolk. December 12, 1912.—May 24, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Tax, Assessment. *Trust. Partnership.*

Upon petitions for the abatement of taxes brought by the trustees under a deed of trust called the "General Investment Trust," by the terms of which the powers and duties of the trustees were essentially the same as those of the petitioners in *Williams* v. *Milton*, *ante*, 1, it was *held*, following that decision, that the beneficiaries were *cestuis que trust* and were not partners, and that the trust property was to be assessed for taxation accordingly.

LORING, J. These are four petitions for the abatement of taxes like those brought in *Williams* v. *Milton*, *ante*, 1. These are brought by the trustees under a deed of trust called the General Investment Trust. The decision in *Williams* v. *Milton* is decisive of the true character of the General Investment Trust. It is a trust and the *cestuis que trust* are not partners. It follows that the plaintiffs are entitled to an abatement in the

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petition against the city of Boston, but not in the other petitions.

So ordered.

J. E. Searle, for the plaintiffs.

W. P. Higgins & R. M. Walsh, for the city of Boston, submitted brief.

W. H. White, for the town of Brookline.

F. Rackemann, for the town of Milton.

W. G. Rowe, for the town of Westwood.

ANNIE R. BOHAKER *vs.* TRAVELERS INSURANCE COMPANY.

Suffolk. December 12, 1912. — May 24, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Insurance, Accident. *Evidence*, Presumptions and burden of proof. *Words*, "Accidental."

In an action against an insurance company to recover for the alleged accidental death of the insured, it appeared that the policy sued upon insured "against bodily injuries, effected directly or independently of all other causes, through external, violent and accidental means (suicide whether sane or insane is not covered)," that the insured, when delirious by reason of severe typhoid fever, was left alone momentarily by his attendant in a room with a single window which was covered by a screen, that a little below the window was a balcony five feet wide with a protecting railing, that thirty feet beneath the balcony was rough and stony ground, that the screen was found torn from the window and the insured was found on the ground unconscious with severe injuries from which he died and which, as experts testified, probably would have caused his death even if he had not been suffering from typhoid fever. *Held*, that the immediate cause of the injuries was the fall, which was external and violent within the meaning of the policy, and which also could have been found to have been accidental. *Held, also*, that it could not be ruled as matter of law that the injuries were not "effected directly and independently of all other causes" through accidental means, as the typhoid fever from which the insured was suffering could have been found to have been simply a condition and not a moving cause of his injuries.

In a policy insuring against bodily injuries effected "through external, violent and accidental means," not covering suicide "whether sane or insane," the phrase "accidental means" was held to have been used in its ordinary sense to denote a casualty happening unexpectedly without intention or design.

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In the absence of clear proof there is a presumption of fact that a person found dead did not commit suicide.

In an action on a policy of accident insurance to recover for the death of the insured from accidental bodily injuries, where the policy contains a provision that "suicide whether sane or insane is not covered," and it appears that at the time of the accident, which was seen by no one, the insured was delirious by reason of severe typhoid fever, although the burden may be upon the plaintiff to prove that the death of the insured was not due to suicide, yet in the absence of evidence of suicide this burden may be found to have been sustained by the presumption of fact against self destruction.

RUGG, C. J. This is an action of contract to recover upon a policy of accident insurance for the death of the insured, John M. Babson. The circumstances under which the insured lost his life were these: He was delirious by reason of severe typhoid fever in a room with a single window which was covered by a screen, and its sill was twenty-eight inches above the floor. Along the outside of the building slightly below the window was a balcony five feet wide with a protecting railing about thirty feet above the rough and stony ground beneath. He was left alone momentarily on an August evening by his attendant, who on returning found the room vacant, and the screen, which had been whole and in position when he left the room, torn from the window. On immediate investigation, the insured was found on the ground under the room unconscious, with severe injuries, which according to physicians probably would have caused his death, even if he had not been suffering from typhoid fever. The policy insured "against Bodily Injuries, effected directly and independently of all other causes, through External, Violent and Accidental Means (Suicide whether sane or insane is not covered), as specified in" a schedule annexed.

The case was tried without a jury before a judge,* who found for the plaintiff after refusing to rule as requested by the defendant (1) that the plaintiff was not entitled to recover as matter of law, (2) that the death of the insured was not effected, directly and independently of all other causes, through external, violent and accidental means, and (3) that the death of the insured was the result of suicide, sane or insane, and hence not covered by the policy.

1. The defendant's first request was denied rightly. "Acci-

* *Pratt*, J. The defendant alleged exceptions.

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dental means" is used in the contract of insurance in its common significance of happening unexpectedly, without intention or design. *United States Mutual Accident Association* v. *Barry*, 131 U. S. 100. The cause of injuries was not wholly conjectural as matter of law. It is plain that the immediate cause was the fall. This manifested itself in evidence which was violent and external. There was basis for the inference that it was accidental, as we have defined that word. It may have been that the deceased, in the heat of his fever and the warm season, in an effort to reach fresh air went to the balcony just outside his window, and there without premeditation or purpose or delirium, but only through weakness, lost his balance and went over the low railing, and received mortal harm. Cases where it has been necessary for a plaintiff to show negligence of some person as the cause, and where it has been said that the cause was conjectural, are clearly distinguishable. Accident is a far more comprehensive term than negligence. *Noyes* v. *Commercial Travellers' Eastern Accident Association*, 190 Mass. 171. *Wicks* v. *Dowell & Co.* [1905] 2 K. B. 225.

2. It would have been error to rule as matter of law that the insured's death was not "effected directly and independently of all other causes" through accidental means. The point of difficulty in this connection is whether the disease did not contribute to the injuries, or at least was it not a cause co-operating with the fall in inducing the result. But the disease may have been found to have been simply a condition, and not a moving cause of the fatal injuries. A sick man may be the subject of an accident, which but for his sickness would not have befallen him. One may meet his death by falling into imminent danger in a faint or in an attack of epilepsy. But such an event commonly has been held to be the result of accident rather than of disease.

In *Manufacturers' Accident Indemnity Co.* v. *Dorgan*, 7 C. C. A. 581, it was said by Taft, J., at 590: "If the deceased suffered death by drowning, no matter what was the cause of his falling into the water, whether disease or a slipping, the drowning, in such case, would be the proximate and sole cause of the disability or death, unless it appeared that death would have been the result, even had there been no water at hand to fall into. The disease would be but the condition; the drowning would be the moving, sole, and proximate cause."

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To the same effect in substance are *Winspear* v. *Accident Ins. Co.* 6 Q. B. D. 42, *Lawrence* v. *Accidental Insurance Co.* 7 Q. B. D. 216, *Ludwig* v. *Preferred Accident Ins. Co.* 113 Minn. 510, *Preferred Accident Ins. Co.* v. *Muir*, 61 C. C. A. 456. The language of this contract, to the effect that the "accidental means" must have operated "independently of all other causes" to produce the death does not change the general rule of law, that the proximate and not a remote cause is the one to which the law looks. Many instances are found where two equally dominant causes co-operate or concur in producing a result. The very numerous cases arising out of joint or simultaneous torts are illustrations. Two or more causes, each proximate in character and only one of which is accidental, may co-operate in producing an injury. In such cases the limiting language of the policy would apply. The present policy does not stipulate that there shall be no recovery, if any other circumstance than the accident, directly or indirectly, wholly or in part, proximately or remotely, contribute to the injury, as do some insurance contracts which have come before the courts. The policy in the case at bar does not go so far as to require the court to search beyond the active, efficient, procuring cause to a cause of a cause. When one single predominant agency is disclosed, directly producing as a natural and probable result the injury, which is accidental, and which operates independently of other like causes, then the effectual means required by the policy have been found. This contract does not require a further and nicer analysis to ascertain whether in the chain of causation another source less demonstrative and more attenuated in its effect or more ulterior in its origin may be found which may more indirectly have a causal connection with injury. *Freeman* v. *Mercantile Mutual Accident Association*, 156 Mass. 351. *Daniels* v. *New York, New Haven, & Hartford Railroad*, 183 Mass. 393. See *Newton* v. *Worcester*, 174 Mass. 181, 187.

The single operating, proximate cause, therefore, might have been found to be the fall and not the fever. *Accident Ins. Co.* v. *Crandal*, 120 U. S. 527. *Scheffer* v. *Railroad Co.* 105 U. S. 249. *Isitt* v. *Railway Passengers Assurance Co.* 22 Q. B. D. 504. *Continental Casualty Co.* v. *Lloyd*, 165 Ind. 52, 59. *Modern Woodman Accident Association* v. *Shryock*, 54 Neb. 250. *Fetter* v. *Fidelity & Casualty Co.* 174 Mo. 256. This having been found as a fact,

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and there being some supporting evidence, the finding of the trial judge will not be disturbed.

3. The defendant urges strongly that the death of the insured was the result of suicide, sane or insane, and hence there could be no recovery. But while that might have been found as a fact, it could not have been ruled as matter of law. Suicide is a crime and involves a high degree of moral turpitude. *Commonwealth* v. *Mink*, 123 Mass. 422. It cannot be assumed without clear proof. The presumption is that one does not commit suicide. Such a presumption being one of fact stands until overthrown by evidence. *Travellers' Ins. Co.* v. *McConkey*, 127 U. S. 661. If it be assumed in favor of the defendant that the burden was on the plaintiff to prove that death was not due to suicide, the presumption against self destruction in the absence of compelling circumstances sustains this burden. Even though the insured was suffering from delirium, as it is agreed that he was, the facts do not require the inference that he jumped to the ground. It was open to the trial judge to find that it was through weakness or otherwise, and not through conscious adaptation of means to an end by a mind unbalanced by fever that he fell to the earth.

Exceptions overruled; judgment affirmed.

W. H. Hitchcock, for the defendant.

A. E. Yont, for the plaintiff.

NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY *vs.* YORK AND WHITNEY COMPANY.

Suffolk. January 9, 1913. — May 24, 1913.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Practice, Civil, Findings of trial judge. *Bill of Lading. Evidence*, Presumptions and burden of proof. *Carrier*, Freight charges, Interstate commerce rates. *Contract*, Implied in fact. *Interstate Commerce. Estoppel. Damages*, Recoupment.

In an action at law a general finding by a judge sitting without a jury, like the verdict of a jury, cannot be revised upon questions of fact if it was warranted by the evidence.

In an action by a railroad corporation for freight charges against a dealer who

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also was a commission merchant, where it appears that the goods were shipped to the defendant as a commission merchant but that this fact was not brought to the knowledge of the plaintiff, if it also appears that the defendant was named as the consignee in the bill of lading and that no other person was named as owner therein, this warrants a finding of fact that the plaintiff was justified in treating the defendant as the owner of the goods.

Where the consignee of goods sent by rail receives them under a bill of lading, one of the terms of which is that the consignee shall pay the freight at the rate stated, and no special rate is stated, but the bill of lading contains a printed provision that the "property will be carried at tariff rates," receipt and acceptance of the goods under the bill of lading is evidence of an implied promise by the consignee to pay the freight charges established under the interstate commerce act.

In an action by a railroad corporation against the consignee of goods, who received them from the plaintiff under a bill of lading by which he agreed to pay the freight rates established under the interstate commerce act, to recover a balance of the freight charges, which had not been claimed at the time of the delivery of the goods by reason of an erroneous classification that was not discovered until several months later, the defense of estoppel is not open, because the rate of the charges which the plaintiff seeks to recover is fixed by law and could not be reduced even by showing an express contract to that effect, and consequently cannot be reduced by an estoppel to deny the existence of such a contract; and for the same reason the defendant cannot be allowed to reduce the damages by showing in recoupment the effect of the payment of and the receipt given for the wrong rate.

RUGG, C. J. This is an action to recover a balance of freight charges which through the carrier's mistake had not been claimed or collected at the time of the delivery of the goods. The case was submitted to a judge of the Superior Court* on an agreed statement of facts with power to draw proper inferences. The material points are that sweet potatoes were shipped by one Culver from Delmar in the State of Delaware to the defendant, a dealer and commission merchant in large business at Boston. The extent of the defendant's business was not fully known to the plaintiff. The goods were shipped to the defendant as a commission merchant, but this information had not been expressly conveyed to the plaintiff. Upon arrival in Boston the goods were delivered to the defendant without previous request or mention of payment of freight, the defendant being upon the plaintiff's credit list and freight bills being sent it weekly. Before the delivery the defendant was told by the plaintiff that the freight was $102.30, and this amount was subsequently paid to the plaintiff and was

* *Keating*, J.

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charged by the defendant in the settlement with its consignor. Several months later it was discovered that a mistake had been made in this statement of the amount due and collected for freight, and that the lawful rate established by the tariff filed and published in accordance with the interstate commerce act had not been collected. The reason was that the goods had been erroneously classified, and that therefore the rate legally due was higher than that at first charged. It is to recover this difference between the rate collected and that lawfully due that this action is brought.

The bill of lading on which the goods were shipped contained this clause: "The owner or consignee shall pay the freight at the rate herein stated and all other charges accruing on said property before delivery . . .; and if, upon inspection, it is ascertained that the articles shipped are not those described in this bill of lading the freight charges must be paid upon the artieles actually shipped and at the rates and under the rules provided for by the published classifications." The judge made rulings, requested by the defendant, that "Failure to collect the lawful rate here was through a mutual mistake of fact" and that the burden was upon the plaintiff "to show the actual weight of all the packages of potatoes as shipped," refused numerous other requests, found for the plaintiff and reported the case.

1. The general finding for the plaintiff stands upon the same ground as a verdict of a jury, and cannot be overturned unless unsupported by substantial evidence. *Bailey* v. *Marden*, 193 Mass. 277. It is evidence of ownership that one is named as consignee in a bill of lading. *Rosenbush* v. *Bernheimer*, 211 Mass. 146, 149. The defendant was named as consignee in the bill of lading of the goods in question. No other owner was named therein. The fact that it was a commission merchant was not expressly brought to the knowledge of the plaintiff. The general finding in favor of the plaintiff may be presumed to have involved the subsidiary conclusion that such information was not impliedly or inferentially brought to its attention. It follows from this that the general finding for the plaintiff may be supported on the ground that the plaintiff in the light of all the facts known to it, rightly treated the defendant as the owner. It cannot be said that such finding was unwarranted.

Moreover, the defendant received the goods under a bill of

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lading, one of the terms of which was that the consignee should pay the freight at the rate stated. No special rate was stated in the bill of lading, but on its face is printed the provision, that unless otherwise provided the "property will be carried at tariff rates," that is, according to the rates established by the published classification. Acceptance and receipt of goods by a consignee under a bill of lading of this tenor is strong evidence of an implied promise on his part to pay the freight. It is enough to support a finding to that effect. *Blanchard* v. *Page*, 8 Gray, 281, 291. *Old Colony Railroad* v. *Wilder*, 137 Mass. 536. *Erie Railroad* v. *Wanaque Lumber Co.* 46 Vroom, 878. It is not necessary to consider what would be the rights of the parties if the plaintiff actually had known, before delivery of the goods by it, that the defendant was an agent of the Delaware owner, for under the circumstances disclosed here there was evidence sufficient to warrant the finding that the defendant, even though an agent, had impliedly promised to pay the lawful freight. *Boston & Maine Railroad* v. *Whitcher*, 1 Allen, 497. The facts in the case at bar distinguish it from *Central Railroad* v. *MacCartney*, 39 Vroom, 165, especially relied on by defendant.

2. The defendant might have been found to have promised by implication to pay the freight rate lawfully established under the interstate commerce act. The aim of that act was to secure for each and every shipper of goods in interstate commerce absolute equality of reasonable rates, uniform in application, without discrimination or preference. The railroad and the shipper are bound inexorably to follow the rate published. No excuse, which operates as an evasion of that rate, has any standing as matter of law in defense of a proved violation of such rate. Mistake, inadvertence, honest agreement and good faith are alike unavailing. *Hooker* v. *Boston & Maine Railroad*, 209 Mass. 598, 603. *New York, New Haven, & Hartford Railroad* v. *Interstate Commerce Commission*, 200 U. S. 361, 391, 399. *Armour Packing Co.* v. *United States*, 209 U. S. 56. *New York Central & Hudson River Railroad* v. *United States*, 212 U. S. 481, 495, 504. As was said in *Louisville & Nashville Railroad* v. *Mottley*, 219 U. S. 467, at 477, "It is now the established rule that a carrier cannot depart to any extent from its published schedule of rates for interstate transportation on file without incurring the penalties of the stat-

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ute." A promise by implication well might have been found to be to pay the only rate which the plaintiff could charge without laying itself open to criminal prosecution, namely, that shown by the published tariff.

3. If the finding of the judge was either that the defendant by implication had promised to pay the legal freight rate or that there were no facts which prevented the plaintiff from relying upon the presumption that the defendant, being the consignee, was the owner, and hence was liable for the freight, then the plaintiff is not estopped to maintain this action. Estoppel against the collection of a rate fixed by rigid law cannot be predicated upon a statement or representation, which at most can be of no higher binding force than an express contract to the same effect honestly made by both parties would be. Such a contract would be of no avail in any aspect, because contrary to law. Estoppel cannot rest on an illegal contract. *Texas & Pacific Railway* v. *Mugg*, 202 U. S. 242. *Chicago & Alton Railroad* v. *Kirby*, 225 U. S. 155, 166. *Gulf, Colorado & Santa Fe Railway* v. *Hefley*, 158 U. S. 98. The reason why there must be inflexibility in the enforcement of the published rate against all and every suggestion for relaxation rests upon the practical impossibility otherwise of maintaining equality between all shippers without preferential privileges of any sort. The rate when published becomes established by law. It can be varied only by law, and not by act of the parties. The regulation by Congress of interstate commerce rates takes that subject out of the realm of ordinary contract in some respects, and places it upon the rigidity of a quasi statutory enactment. The public policy thus declared supersedes the ordinary doctrine of estoppel, so far as that would interfere with the accomplishment of the dominant purpose of the act. It does not permit that inequality of rates to arise indirectly through the application of estoppel, which it was the aim of the act to suppress directly. To this effect are decisions of other courts. *Melody* v. *Great Northern Railway*, 25 So. Dak. 606. *Louisiana Railway & Navigation Co.* v. *Holly*, 127 La. 615. *Chicago, Rock Island & Pacific Railroad* v. *Hubbell*, 54 Kans. 232. *St. Louis & San Francisco Railway* v. *Ostrander*, 66 Ark. 567. *Haurigan* v. *Chicago & Northwestern Railway*, 80 Neb. 132, 139.

4. The same reasoning makes ineffectual the defendant's ar-

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gument for recoupment and as to the effect of payment of and receipt for the wrong rate. The hardship, if any has been wrought in the present case, arises out of the enforcement of a positive rule established for the accomplishment of a broad public purpose. The probability of damages arising from mistakes of this kind perhaps has been reduced by the penalty upon the carrier provided by U. S. St. 1910, c. 309, § 9 (36 U. S. Sts. at Large, 548). But this is payable to the United States, and no direct relief is afforded to the shipper.

5. The defendant, in view of an adverse decision upon the points already discussed, has waived its other exceptions. Hence they are not considered.

Judgment for the plaintiff on the finding.

J. L. Hall, for the plaintiff.

A. L. Taylor, for the defendant.

CITY OF BOSTON *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. January 10, 1913. — May 24, 1913.

Present; RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Boston. Boston Elevated Railway Company. Washington Street Tunnel. Words, "Construction."

Sections 7, 10, of St. 1902, c. 534, which authorized the construction of the Washington Street tunnel in Boston, provided that from the beginning of the use of the tunnel the Boston Elevated Railway Company should pay to the city of Boston an annual rental equal to four and one half per cent of the net cost of the tunnel and subway, and that the value of property taken but no longer needed for the purposes of the tunnel should "be deducted from the cost of the tunnel . . . for the purpose of ascertaining the rental thereof." Section 16 provided that all rents received by the city for the use of any lands or rights taken should be used by the treasurer of the city, with the rents received for the use of the tunnel and subway, for meeting the sinking fund requirements and the interest of the bonds issued by the city under the act, and that any surplus should be used as a part of the general revenue of the city. Certain portions of land taken under the act and paid for by bonds issued by the city under the act became unnecessary for the purposes of the tunnel. During a period of time before the beginning of the use of the tunnel the city paid interest on the bonds issued to

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pay for the land and received rents from the land. *Held*, that the net cost of the tunnel was to be ascertained as of the time when its use began and that the deduction of the value of property taken and not needed should be made as of that time.

CONTRACT by the city of Boston against the Boston Elevated Railway Company for $35,038.69 alleged to be due as rent for the use of the Washington Street tunnel under a contract of lease dated September 25, 1902, and authorized by St. 1902, c. 534. Writ dated August 10, 1911.

In the Superior Court the case was submitted upon an agreed statement of facts to *Irwin*, J., who reported it for determination by this court.

J. P. Lyons, for the plaintiff.

A. A. Ballantine, for the defendant.

RUGG, C. J. The plaintiff brings this action to recover rental for the Washington Street tunnel. For the completion of the tunnel with its approaches the city of Boston took three estates, which thereafter became in part unnecessary for tunnel purposes. The value of the surplus portions of these estates was agreed upon by the parties, and this value was deducted from the gross cost, in order to ascertain the net cost for the purpose of fixing the rental to be paid to the city by the defendant. The takings and proceedings are agreed to have been regular. The city paid for these estates by bonds issued as provided by law, and paid interest thereon. Payments for these takings were made a considerable time before the value of the surplus takings was agreed upon. During this interval of time the city paid interest on the bonds it had issued in payment for the estates, and received certain rentals from parts of the estates. The only question to be decided is the point of time when the deduction of the agreed value of the surplus takings shall be made, whether (1) at the time of the payments for the takings, or (2) at the time of the opening of the tunnel when the rental was fixed.

The decision depends upon the construction of §§ 7, 10 and 16 of c. 534 of St. 1902. The statute makes no express provision touching this matter. It must be examined as a whole, and reasonable effect given to all its terms. The substance of § 7 is that the value of property taken but no longer needed "shall be deducted from the cost of the tunnel . . . for the purpose of as-

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certaining the rental thereof." This is the only provision in the act for any deductions from the expenses incurred by the city. There is no indication of intention that sums received for the temporary rent of property taken but determined finally not to be needed should be deducted from the initial cost in order to ascertain the cost upon which should be based the rental to be paid by the defendant. Indeed, that there was no such legislative intention is manifest from § 16 in this language: "All rents, tolls, percentages or other annual compensation received by the city for any use of the tunnel or subway under this act, or for any use of any lands or rights taken under authority of this act, shall annually be used by the treasurer," (1) to meet sinking fund requirements, (2) to meet interest on bonds, and (3) the surplus to the general revenue of the city. In view of this express provision, the fact that the rental received by the city from the surplus real estate involved in this action was large in amount must be regarded as an immaterial circumstance in deciding the case at bar. The Legislature has determined with precision, in terms not open to controversy as to meaning, the accounts to which such rent must be credited.

Section 10 requires the annual rental, which the defendant shall pay to the plaintiff, to be "equal to four and one half per cent of the net cost of the tunnel," and later defines "net cost" as including "all expenditures incurred in acquisition and construction, including damages, expenses and salaries of the commission, and interest at three and one fourth per cent per annum on the debt incurred in construction prior to the beginning of the use." This language is broad enough to include the interest on all the bonds issued for payment of the lands here in question. Indeed, it is explicit in this respect. The bonds issued for the purpose of securing money to pay for these takings constituted a debt incurred in acquisition and construction. The only way in which the city was permitted to procure the money with which to meet expenses, both of acquisition and construction, was by the sale of bonds as provided in § 16. The interest on these bonds, not at the rate actually paid, but at a rate fixed by the statute, is included in the net cost of the tunnel. That the word "acquisition" is not repeated at the end of the sentence above quoted is not of much significance. The statute is to be interpreted in the light

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of the broad purposes to be accomplished under it. "Construction" in this connection is a word of import large enough to include takings of land. Moreover, the statute makes no provision for a division of the debt between acquisition and construction expenses, nor for interpreting these two words as antithetical. All bonds issued under the statute are to be designated on their face "Boston Tunnel and Subway Loan." It is plain that the statute does not undertake with nicety and exactness to reimburse the city for its cost. While by § 16 the rate of interest it may pay on such bonds as these is four per cent, the interest, which may be charged on such indebtedness in ascertaining the net cost on which the rental to be paid by the defendant is based, is only three and one fourth per cent. In face of this provision, the argument that the defendant suffers an injustice by permitting the city to retain its rental of surplus land loses much of its force. Other considerations and circumstances may have been within the contemplation of the Legislature in using defined rates of interest, rather than the actual amounts paid with deductions for *ad interim* income.

The conclusion is that the natural meaning of the statute, construing its words according to their common significance, is that the net cost of the tunnel is to be ascertained as of the time when its use begins, and that the deduction for surplus property taken should be made as of that time. In no other way can the city receive interest on the cost to it of the tunnel during construction, and the rents received from such surplus land be contributed to its sinking fund and other specified use.

Judgment should be entered in favor of the city for the entire amount claimed by it, and it is

So ordered.

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WILLIAM C. COLEMAN *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

Suffolk. January 15, 1913. — May 24, 1913.

Present: RUGG, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Conversion, Evidence of right of possession. *Bill of Lading*. *Evidence*, Presumptions and burden of proof. *Practice, Civil*, Ordering verdict. *Sale*, Stoppage *in transitu*. *Carrier*. *Damages*, In contract. *Contract*, Validity.

In an action against a carrier for an alleged conversion of goods, if it appears that the plaintiff was named as consignee in the bill of lading of the goods and that he had possession of the bill of lading, this is evidence of the plaintiff's right to the immediate possession of the goods.

In an action of contract, where a substantial part of the evidence is oral or consists of inferences to be drawn from the circumstances shown, it seldom can be ruled that the party on whom the burden of proof rests is entitled to a verdict. The present case gave no occasion for such an exceptional ruling.

In an action by the consignee of goods against a carrier for their alleged conversion, where it appears that the carrier returned the goods to the consignor, who claimed the right of stoppage *in transitu*, if there is evidence that after the arrival of the goods at their destination the plaintiff on two occasions examined them in the hands of the defendant and took samples from them, that upon demand from the defendant he paid the freight and storage charges on the goods up to the date of such payment but left the goods in the hands of the defendant and failed to pay the consignor for them or to pay the defendant further storage charges, the question whether the transit had been terminated by a constructive delivery of the goods to the consignee, so that the right of stoppage *in transitu*, if it existed, had been lost, is a question of fact for the jury.

The insolvency of a consignee of goods which is necessary to give the consignor the right of stoppage *in transitu* need not be shown by proof of adjudication, but consists simply of inability to pay debts in the usual course of business, and may be proved as a rational inference from convincing facts and circumstances. In the present case evidence that, after several failures on the part of the consignee to pay for the goods upon demands by the consignor, a draft on the consignee by the consignor for the price of the goods, through a bank at the residence of the consignee, was returned to the consignor with notice that the consignee was out of the city, was held to be evidence for the jury of the insolvency of the consignee.

A provision in a bill of lading of goods sent by rail, that "the amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the *bona fide* invoice price, if any, to the consignee . . .)" is not contrary to public policy, and, in an action against a carrier for the breach of a contract to deliver the goods shipped under such a bill of lading, where the contract of carriage is not repudiated by the carrier, this limitation of the damages that can be recovered is valid and enforceable.

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RUGG, C. J. This is an action to recover the value of goods. The material facts are that in July, 1909, the plaintiff agreed to purchase from the Lake Shore Rubber Works fifty-five bales of scrap packing weighing forty-four hundred pounds, the invoice price being two and one half cents per pound. The packing was shipped by the Lake Shore Rubber Works, consignor, from Erie, Pennsylvania, to William C. Coleman Company,* consignee, Boston, Massachusetts. A bill of lading was issued by the initial carrier and sent by the consignor to the plaintiff. The consignment reached Boston on July 12, and the plaintiff was notified by the defendant who was the final carrier. Soon after the plaintiff went to the freight house of the defendant, examined the goods, and on two occasions, the dates of which are not fixed in the report, took samples. On September 20 he paid the freight and storage charges to that date. On November 5 the defendant sent a notice to the plaintiff to the effect that storage charges were running against the consignment, and requesting disposition of the goods. In October, 1909, the consignor drew on the plaintiff by draft on a Boston bank, which was returned to the consignor with notice that the plaintiff was out of the city. On several earlier occasions demand for payment was made on the plaintiff, but he has never paid for the goods. Late in November, 1909, the consignor requested the initial carrier to return the consignment to it, and on November 29 the defendant on demand by it returned the goods to that carrier, which delivered them to the consignor. In the latter part of February or early in March, 1910, the plaintiff demanded the goods of the defendant. There were four counts in the declaration, the first and second being for a conversion, and the third and fourth for breach of contract. The first and fourth counts described the property which is the subject of the action as: thirteen hundred ninety-seven pounds of piston packing, fifteen hundred fifty-three pounds of hydraulic packing, seven hundred fifty-seven pounds of mixed packing, and seven hundred and four pounds of special packing, while the second and third counts described the property as fifty-five bails of rubber packing. At the close of the evidence, the defendant requested that a verdict be directed in its favor on all the

* This was the name under which the plaintiff did business.

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evidence and on each of the counts, and made other requests for rulings, all of which were refused. Upon this evidence (which is stated to be all that is material) the presiding judge* instructed the jury that the plaintiff was entitled to recover, and left for determination by the jury only the fair market value of the goods.

1. The defendant has argued at length that there was no sufficient evidence that the plaintiff was the owner of the goods. But this contention is not sound. The plaintiff was named as consignee in the bill of lading. This was some evidence of title. *Rosenbush* v. *Bernheimer*, 211 Mass. 146, 149. Possession of the bill of lading in which the plaintiff was named consignee was at least evidence of right to immediate possession of the goods. The question is not presented whether the contract for the sale of fifty-five bales of scrap packing was complied with by the delivery of such property as was described in counts one and four. The evidence is not reported on this point, and hence one cannot say that it ought to have been ruled either that the plaintiff was not the owner or that the proof did not correspond with the allegations.

2. But on the other hand it could not have been ruled as matter of law that the plaintiff was the owner or entitled to possession, which was the effect of the direction of a verdict. The burden of proof in this respect was on the plaintiff. Where one party has the burden of establishing certain facts affirmatively, and a substantial part of the evidence offered is either oral or consists of inferences to be drawn from circumstances, it is rarely that it can be ruled as matter of law that the party upon whom rests the burden of proof is entitled to a verdict. The present is not such a case.

As the case must go back for another trial we consider such questions as are likely to arise then, which are raised on this record.

3. The question of difficulty is whether the transit was at an end as matter of law, so that the vendor's right of stoppage *in transitu* was gone. The abstract statement of the law in this particular has been so thoroughly considered that it is not now

* *Aiken*, C. J. The defendant alleged exceptions.

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open to doubt. The right of stoppage *in transitu* is one favored by commercial law. It endures so long as the goods remain in the possession of the carrier by virtue of the contract of carriage and until there has been an actual or constructive delivery to the consignee. No controversy ordinarily can arise when there has been an actual delivery. A constructive delivery may be found when the carrier has recognized the title of the consignee, has attorned to him and has agreed to hold the goods "not merely as carrier or as a warehouseman pending a complete delivery to the purchaser, but as agent for the purchaser under a new contract made and assented to by both the carrier and the purchaser." *Norfolk Hardwood Co.* v. *New York Central & Hudson River Railroad*, 202 Mass. 160, 162. *Brewer Lumber Co.* v. *Boston & Albany Railroad*, 179 Mass. 228. It was said in *Whitehead* v. *Anderson*, 9 M. & W. 518, at 534, 535: "Where the carrier enters expressly or by implication, into a new agreement, distinct from the original contract for carriage, to hold the goods for the consignee as his agent, not for the purpose of expediting them to the place of original destination, pursuant to that contract, but in a new character, for the purpose of custody on his account, and subject to some new or further order to be given to him," then constructive possession is in the vendee, and the transit is at an end. To the same point see *Ex parte Cooper*, 11 Ch. D. 68; *Bethell* v. *Clark*, 20 Q. B. D. 615; *Lyons* v. *Hoffnung*, 15 App. Cas. 391, 397 It could not have been ruled rightly as matter of law that under these principles of law the transit in the case at bar was ended. All that had occurred was the arrival of the goods in Boston and two notices, alike in tenor, sent by the carrier to the consignee, and payment of the charges up to a certain time. It is not certain that the consignee had accepted the goods. After paying the freight charges, if his testimony is taken literally, he had examined the bales at least once for the taking of samples. The purpose of this is not disclosed, but it is not inconceivable that it may have been to ascertain whether the goods corresponded with the terms of the contract of sale to him. The payment of freight is not a decisive evidence of the termination of the transit. *Naylor* v. *Dennie*, 8 Pick. 198. *Reynolds* v. *Boston & Maine Railroad*, 43 N. H. 580.

4. The question whether the consignor had the right of stop-

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page *in transitu* was one of fact upon all the evidence, and not properly one of law. This right of an unpaid vendor to enforce his lien by possessing himself of goods, whereof the purchaser has acquired the title but not the possession, can be exercised only when the buyer is insolvent. By insolvency in this connection is meant not an adjudication by a court of competent jurisdiction, but simply inability to pay debts in the usual course of business. Such inability need not be absolute. It may be proved as a rational inference from convincing facts and circumstances. A business man in good standing commonly meets his obligations at maturity. A failure to pay a single debt might occur under such conditions as to constitute persuasive evidence of general inability to pay one's debts. *Lee* v. *Kilburn*, 3 Gray, 594, 599, 600. *Durgy Cement & Umber Co.* v. *O'Brien*, 123 Mass. 12, 13. *Peabody* v. *Knapp*, 153 Mass. 242. *Jeffris* v. *Fitchburg Railroad*, 93 Wis. 250. Williston on Sales, § 522, and cases there cited. There were circumstances in the case at bar tending to throw such doubt upon the solvency of the plaintiff as to require the submission of that question to the jury.

5. If upon a new trial it should be found that the transit had not ended and yet the plaintiff was not insolvent so that the vendor had no right of stoppage *in transitu*, the measure of damages may become important. The bill of lading contained the condition that "The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the *bona fide* invoice price, if any, to the consignee . . .)." It was a reasonable contract to base the damages to be recovered in case of loss upon the genuine and honest invoice price between the parties. There is nothing contrary to public policy in such a contract. It comes within the principle declared in *Bernard* v. *Adams Express Co.* 205 Mass. 254, which has been adopted in *Adams Express Co.* v. *Croninger*, 226 U. S. 491, as applicable to interstate commerce under federal statutes. If the plaintiff at a new trial shows himself entitled to recover for breach of the contract to deliver under the bill of lading he must be limited in damages to the amount therein stipulated. It is only when the contract of carriage is repudiated by the carrier that the limitation as to value of the goods

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is abrogated. *McKahan* v. *American Express Co.* 209 Mass. 270.

Exceptions sustained.

E. S. Kochersperger, for the defendant.

N. Samsel, for the plaintiff, submitted a brief.

CATHERINE BUCKLEY, administratrix, *vs.* BOSTON ELEVATED RAILWAY COMPANY.

SAME *vs.* SAME.

Middlesex. January 16, 1913. — May 24, 1913.

Present: RUGG, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Negligence, Street railway. *Carrier. Practice, Civil*, Exceptions, Conduct of trial: judge's charge; rulings and instructions; argument before jury. *Evidence*, Of state of mind, Absent witness. *Witness. Words*, "Negligence," "Highest degree of care."

The word "negligence," as used in St. 1907, c. 392, § 1, giving a right of action where "a corporation which operates a railroad or a street railway, by reason of . . . the . . . negligence of its servants or agents . . . causes the death of a passenger," means the want of care which the law requires under the circumstances disclosed in each case.

The phrase, "highest degree of care," which has come to be used commonly as expressing the duty of a common carrier toward its passengers, when accurately analyzed, means only that degree of caution which is reasonable in view of the relation of the parties and the fatal consequences which may ensue from a breach of that duty. By RUGG, C. J.

At the trial of an action for causing personal injuries to and the death of one who was alleged to have been thrown to the ground by the starting of an open street car as he was boarding it, the defendant's evidence tended to show that the deceased ran and attempted to board the car while it was in motion. The judge in his charge gave certain instructions to the jury relating to the duty of the conductor before starting the car to wait for persons desiring to board it. At the close of the charge the defendant objected to that portion of the charge, and the plaintiff's counsel, in the hearing of the jury, stated that he was willing that the jury should be instructed "that a man running and jumping on a moving car cannot recover." The judge then so charged the jury, stating that he did so "with the consent of the plaintiff," and the defendant excepted. *Held*, that any error in the charge on the subject referred to was cured by the additional instructions given; and that, although it is not good practice for the counsel to suggest in the hearing of the jury instructions that he is willing should be given, no harmful error was shown in this case.

At the trial of an action for the conscious suffering and death of one alleged to

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have lost his life by reason of negligence of an employee of a street railway company, evidence is admissible, for the purpose of proving the state of mind of the injured person after the injury and, by inference, his mental suffering, which tends to show that he said, after the accident and before the bringing of the action, that his back was broken and he knew that he was not going to get better.

At the trial of an action against a street railway company for causing personal injuries to and the death of a passenger, the plaintiff's counsel, after questioning the conductor of the car in cross-examination in regard to the number of witnesses whose names he had taken and eliciting the fact that the witness could not answer accurately without reference to a report in writing made by him to the defendant, asked the defendant's counsel, "May I see the report for the purpose of refreshing his recollection?" The defendant's counsel offered to produce the report if the plaintiff wanted it to put it in evidence, but not otherwise. The plaintiff did not accept the condition. The witness did not ask for the report. The plaintiff's counsel in his closing argument stated that the defendant did not dare to produce the report because it would disclose that it contained the names of witnesses whom the defendant did not call because, if called, they would have corroborated the plaintiff's evidence. The defendant objected to the argument but the trial judge refused to stop it or to rule it out as improper and in his charge to the jury instructed them that "any argument that was made upon the situation . . . was a proper argument to make." The defendant excepted. *Held*, that the exception should be sustained, because the argument was unfair and unwarranted by the evidence, and the charge did not correct the error.

TWO ACTIONS OF TORT, the first being for the conscious suffering, and the second for the death of one Daniel J. Buckley, alleged to have been caused by the starting of an open street car of the defendant as he was in the act of boarding it. Writs dated August 16, 1907.

In the Superior Court the cases were tried together before *Hitchcock*, J. The material facts are stated in the opinion.

Portions of the judge's charge to which the defendant excepted, which are referred to in the opinion, were as follows:

"Now, referring to the question whether a person becomes a passenger or not: If a street car stops at a usual stopping place for the purpose of receiving passengers, or if it stops in response to a signal that a person desires to take a car, it is then considered that an invitation is extended to persons waiting to take the car at that place or have signalled the car, to become a passenger, and if that invitation is extended, it is the duty of the company to give an opportunity for all persons to enter the car who desire to do so, and it has been said that the mere giving of reasonable time is not sufficient. A conductor in charge of a car must know, as far as he can by the exercise of due care, caution

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and diligence — I use that expression as an expression that has been used in our courts — it is his duty to know, if he can by the exercise of due care, caution and diligence, that all persons who desire to board the car at that place have done so, or, at least, have so far proceeded in the boarding of the car as to make it reasonably safe to start the car, before he should give any signals to start the car. If a car is at a stop for the reception of passengers and the conductor, making a proper observation, does not see anybody further desiring to board the car, then he, of course, has a right to give a signal to go ahead, although it may be that somebody may run after the car while, under the circumstances disclosed, the fact that the person desiring to take the car was not known to the conductor or would not have been known to him if he had made this reasonable investigation that I have referred to, then there was no negligence on his part in starting the car."

At the close of the charge the defendant's counsel objected to the foregoing portion of the charge. The plaintiff's counsel then in the hearing of the jury, stated: "I am perfectly willing your honor should say that a man running and jumping on a moving car cannot recover; I am perfectly willing your Honor should say that and say that is assented to by the plaintiff;" and the judge stated to the jury, "With the consent of the plaintiff I instruct you as a matter of law that if the jury find that the plaintiff — meaning by that the deceased person — after the car had started, ran out and attempted to get on the car, and fell and was injured, the plaintiff is not entitled to recover in either action." The defendant's counsel excepted to this method of dealing with the questions of law raised by him.

In the midst of the argument of the plaintiff's counsel which is characterized in the opinion as "unfair and unwarranted," the defendant's counsel interrupted to interpose an objection, when the judge asked him to put his request in writing, and the plaintiff's counsel continued with an argument of the same tenor. At the close of the argument the defendant's counsel presented a request in writing that the jury be instructed "that any refusal on the part of the defendant's counsel to submit a conductor's report is immaterial to the issue and not a proper subject of argument." In his charge the judge dealt with this request as follows:

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"Now, in the course of the argument the question was raised, and I am asked by the attorney for the defendant to instruct the jury, that any refusal on the part of the defendant's counsel to submit to you evidence of the conductor's report is immaterial to the issue and not a proper subject of argument. Very many years ago in this Commonwealth the question was raised in court as to whether a witness upon the stand would be required to consult a memorandum when he did not want to, and in that case, according to the report, the witness declined to look at a memorandum which was laid upon the table to refresh his recollection, and declined to so do unless directed by the court, and the court directed him to do so. . . . [Here followed a quotation from the opinion of Shaw, C. J., in *Chapin* v. *Lapham*, 20 Pick. 467, 472, 473, and then the judge continued:] . . .

"That question arose where the witness himself declined to consult a memorandum. In this case request was made that he be allowed to consult a memorandum which apparently was in the possession of the counsel for the defendant. No appeal was made to the court, and no order was made by the court in regard to it.

"The parties must leave the matter to you just as it stood before you, and any argument that was made upon the situation to you was a proper argument to make, and the jury are entitled, of course, to draw what inferences would reasonably and naturally be drawn from that which appears to them. You are not at liberty to guess anything, but you are at liberty to infer from that which is presented to you that which from the ordinary expression and meaning might be considered as usual to follow or would result from that which is presented to you."

The jury in answer to a special question found that the plaintiff's intestate did not attempt to board the car while it was in motion and found for the plaintiff in the first case in the sum of $750, and in the second case in the sum of $2,800.

The defendant alleged exceptions.

H. D. McLellan, for the defendant.

R. H. Sherman, for the plaintiff.

RUGG, C. J. These are two actions whereby the plaintiff seeks to recover for the conscious suffering and the death of her intestate, who received fatal injuries from a car of the defendant company.

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1. The defendant's request that a verdict be directed for it in each action was denied rightly. There was evidence from which it might have been found that the plaintiff's intestate, approaching toward the rear an open car of the defendant for the purpose of becoming a passenger, was beckoned by the conductor to a point farther forward, and as he was in the act of getting upon the car it started under such conditions that he lost his hold and was injured. In view of these facts it is too plain for further discussion that a general verdict for the defendant ought not to have been directed. While the weight of the evidence on the printed record seems to indicate strongly that the accident happened in another way, it does not as matter of law require such a finding.

2. The defendant contends that it is not liable for the death of a passenger caused by the act of a servant who is in the exercise of ordinary care but fails to attain to the highest degree of care consistent with the conduct of its business. St. 1907, c. 392, under which this action is brought, is a penal statute. *Jones* v. *Boston & Northern Street Railway*, 205 Mass. 108. It gives a cause of action if the life of a passenger is lost "by reason of the . . . negligence of its agents or servants while engaged in its business." Negligence in this connection means the want of care which the law requires under the circumstances disclosed in each case. If the degree of care required is the highest consistent with the conduct of the business of the common carrier, then the negligence referred to in the statute is a failure to exercise that degree of care. Indeed, the phrase, "highest degree of care," which has come to be used commonly as expressing the duty of a common carrier towards its passengers, when accurately analyzed, means only that degree of caution which is reasonable in view of the relation of the parties and the fatal consequences which may ensue from breach of this duty. *Donahoe* v. *Boston Elevated Railway*, 214 Mass. 70. See *Renaud* v. *New York, New Haven, & Hartford Railroad*, 206 Mass. 557, 560. The contention of the defendant in this regard cannot be supported.

3. It is not necessary to determine whether the portion of the charge excepted to was inaccurate, in that it omitted to state with clearness and fulness the element that the conductor was not obliged to wait for those running from a distance and in

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that way expressing a desire to board the car, although not then in a position to avail themselves instantly of the invitation to become passengers held out by the stopping of the car, and that such invitation might be withdrawn at any time before actually accepted by a would-be passenger, (*Davey* v. *Greenfield & Turner's Falls Street Railway*, 177 Mass. 106. *Duchemin* v. *Boston Elevated Railway*, 186 Mass. 353,) nor to determine whether the charge as given was adapted to the evidence for the reason that at the conclusion of the charge the judge further instructed the jury that if the plaintiff's intestate attempted to board the car after it was started, the plaintiff was not entitled to recover in either action. This was sufficiently favorable to the defendant. This additional charge was given at the request of counsel for the plaintiff made in the hearing of the jury. While it is not good practice for the counsel to suggest in the hearing of the jury instructions which he is willing should be given, it cannot be said that any harmful error is disclosed in this regard.

4. There was no error in the admission of the testimony to the effect that the plaintiff's intestate said, before the bringing of the present action, that his back was broken and he knew that he was not going to get better. As appears from the tenor of the question, it was offered not for the purpose of proving the physical condition of the intestate but his state of mind, and by inference his mental suffering. This was admissible under R. L. c. 175, § 66, which has been liberally construed.

5. During the cross-examination of the conductor of the defendant's car, the counsel for the plaintiff, after inquiring as to the number of witnesses whose names were taken by him, and eliciting the fact that he could not tell precisely how many there were upon the accident report made by him, asked counsel for the defendant, "May I see the report for the purpose of refreshing his recollection as to the number of witnesses? I just want him to take it." The reply was a proffer of the report if the plaintiff wanted it to go in evidence, but not otherwise. The witness did not ask for the report for the purpose of refreshing his recollection. In his argument to the jury, counsel for the plaintiff referred to this circumstance, and argued at length that "the defendant did not dare to produce the report for the reason that

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if he had done so it would appear that the report contained the names of witnesses whom the defendant did not call and could not call for the reason that if they had been called, they would have substantiated the plaintiff's contention as to the manner in which the accident happened." Seasonable interruption was made and exception taken to this argument. Although requested, the trial judge refused to rule that the argument was improper.

The defendant's exceptions to this incident must be sustained. The argument was unfair and unwarranted by the evidence. Not only did the defendant not refuse to produce the report, but proffered it to the plaintiff on condition that it should be introduced in evidence. Under these circumstances, there was no ground for the inference that the defendant had not called all the witnesses that were named in the report, nor that it had failed to call them for the reason suggested. This is a repetition of the same argument under slightly different circumstances, which was remarked "not to have been legitimate" in *Jones* v. *Boston & Northern Street Railway*, 211 Mass. 552, 555. As was said by Chief Justice Field in *McKim* v. *Foley*, 170 Mass. 426, at 428: "The practice of permitting counsel to comment on the failure of the opposing party to call witnesses to facts needs to be used with caution, and such comment should be permitted only where it appears that the witnesses could have been produced, and that it is a fair inference from the conduct of the party, under all the circumstances, that he knew or believed that the testimony of the witnesses would be adverse, and for that reason did not produce them." The charge of the judge failed to correct the error.

Exceptions sustained.

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ELIZABETH L. TUTTLE *vs.* CITY OF BOSTON.

Suffolk. January 21, 22, 1913. — May 24, 1913.

Present: RUGG, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Governor, Veto. *Veto. Statute*, Validity. *Evidence*, Best evidence. *Practice, Civil*, Agreed statement of facts. *Words*, "Returned."

Whether at the hearing upon an agreed statement of facts of a case involving the question, whether the Governor had exercised his veto power within the time prescribed in c. 1, § 1, art. 2 of the Constitution, the facts agreed upon would be competent evidence to controvert a statement of facts with regard to the veto appended by the Secretary of State as a note to the official printed copy of the statute, it here was not necessary to decide, because the facts set forth in the agreed statement were included in the secretary's note properly interpreted.

The Governor has not returned a bill of which he does not approve to the branch of the Legislature in which it originated with his objections thereto in writing within five days as required by c. 1, § 1, art. 2 of the Constitution in order to make his veto effectual, if on the fifth day his veto message is placed upon the desk of the clerk of that branch of the Legislature after the end of the legislative session for that day and after the office of the clerk has been closed in the ordinary and reasonable course of business and the clerk and his assistants have departed.

CONTRACT for an instalment of pension alleged to be due to the plaintiff under the provisions of St. 1912, c. 723, upon her retirement under the conditions set forth in that statute from the office of assistant probation officer of the Municipal Court of the City of Boston. Writ dated November 2, 1912.

In the Superior Court the case was heard by *Dubuque*, J., upon an agreed statement of facts. The material facts are stated in the opinion. The judge found the facts as stated in the agreed statement and reported the case for determination by this court.

F. T. Field, for the plaintiff.

J. P. Lyons, for the defendant.

RUGG, C. J. This is an action of contract to recover an instalment of pension alleged to be due under St. 1912, c. 723. All the requirements of that act have been complied with. The single question is whether this statute was passed and became a law of the Commonwealth or was vetoed by the Governor.

In the official edition of the Acts and Resolves for 1912 (see R. L. c. 9, § 1), which is the evidence of the laws enacted during that

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year (R. L. c. 175, § 73) is found a note by the Secretary of the Commonwealth, from which it appears that this bill (with another bill and resolve on the same footing) originated in the House of Representatives, was enacted by both branches of the General Court, and was "laid before the Governor for his revisal" on May 21. It was found with the other bill and resolve on the desk of the clerk of the House of Representatives on Tuesday, May 28, accompanied by veto messages from the Governor. It with the others "was due to be returned" by him to the House of Representatives on Monday, May 27. The speaker ruled that the vetoes were "without question returned after the clerk's office was closed on the last day during which, under Article II of section I of chapter I of the Constitution, three of the vetoes should apparently have been returned. There is no official record, whether the vetoes were left in the clerk's office before or after midnight. The chair therefore rules that simply leaving the papers in the clerk's office after it is closed is not such a return to the House of Representatives of the bills and resolves, with his objections thereto in writing, as is required by the Constitution, as the House can take cognizance of." This appears to mean that, although there was no record of the precise time when the message from the Governor was left in the office of the clerk of the House, the speaker, acting either upon information or upon reasonable presumptions in favor of the legality of the acts of a co-ordinate department of government (*McCarthy* v. *Commonwealth*, 204 Mass. 482, 485) assumed as the ground for his ruling that the message was in fact left in the clerk's office after it closed and when neither the clerk nor any representative of his was there, during Monday, May 27, which was the last of the five days within which under the Constitution the Governor had a right to express effectually his objection to the measure. This is the interpretation we place upon the ruling. This ruling, apparently having been acquiesced in by the House, became its action, and being published under the official sanction of the Commonwealth is treated as the foundation upon which the decision of this case must rest. As the agreed facts are in accord with this interpretation of the record in the official book, it is not necessary to discuss the question of their competency.

The language of the Constitution, (c. 1, § 1, art. 2,) so far as now

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material, is "No bill or resolve of the senate or house of representatives shall become a law, and have force as such, until it shall have been laid before the governor for his revisal; and if he, upon such revision, approve thereof, he shall signify his approbation by signing the same. But if he have any objection to the passing of such bill or resolve, he shall return the same, together with his objections thereto, in writing, to the senate or house of representatives, in whichsoever the same shall have originated. . . . And in order to prevent unnecessary delays, if any bill or resolve shall not be returned by the governor within five days after it shall have been presented, the same shall have the force of a law." The question is whether placing a veto message by the Governor upon the desk of the clerk of the branch of the Legislature in which the bill originated after the end of the legislative session for the day and after the office had been closed in ordinary and reasonable course and the clerk and his assistants had gone, was an exercise of the constitutional right vested in the Governor.

After a bill has been passed by the Legislature, it must be presented to the Governor for revisal, and then there are three ways and only three in which it may become a law: first, by the approval of the Governor manifested by his signing the same; second, by a passage of the bill after consideration of it, notwithstanding objections made by the Governor by a vote of two thirds of each branch of the Legislature; and third, by a failure on the part of the Governor either to approve or disapprove within five days after it shall have been presented to him, when it shall have the force of a law. It is contended by the plaintiff that the bill became a law in the third way.

The duty of revisal of acts passed by the legislative department of government, which is vested by the Constitution in the Governor, is a personal duty. It must be performed by him alone, and cannot be delegated. It is a high prerogative. It enables the single executive officer chosen by all the people to interpose his judgment against that of their representatives in the legislative department, and to compel a consideration by them again of the wisdom of the proposed law. It permits them to enact a law against his objections only by a two thirds vote of each legislative branch, instead of by a majority vote as is the rule touching ordinary legislation. It is a power conferred by the Constitution itself.

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It cannot be narrowed or cut down in any respect by the legislative department. The time within which it is to be exercised under the Constitution cannot be lessened, directly or indirectly, by the Legislature. So long as the veto power is exercised within the limits prescribed by the Constitution, it is effective. But the extraordinary character and far reaching consequences of the act of veto are some indication of a necessity that it shall be exercised with a regularity and orderliness commensurate with its importance.

The computation of time from a date or from an event or act done excludes the day of the date, *Bemis* v. *Leonard*, 118 Mass. 502, and also excludes Sunday when the time limited is less than a week, *Cunningham* v. *Mahan*, 112 Mass. 58, unless a different intention is manifested in the statute or writing to be construed.

These general rules apply to the interpretation of the clause of the Constitution now under consideration. The circumstances of the present case do not require a determination whether legislative or calendar days are intended by the Constitution. See *Opinion of the Justices*, 3 Mass. 567. Nor need it be decided whether, if seasonable notice was given by the Governor to the branch of the Legislature in which the bill originated of his intention to return it with his objections to it or to its clerk, it would be necessary for that branch or its clerk to arrange for the reception of such communication from the Governor within such time on the last of the five days allowed as would enable him in the exercise of the discretion vested in him to complete necessary investigations, conclude deliberations, and formulate objections. The facts disclosed on this record are that without such notice and after the branch of the Legislature in which the bill originated had adjourned for the day, and after the usual and reasonable time for closing the office of its clerk had come, and after it in truth was closed and no one was there, the veto message was placed on the clerk's desk. The clerk's office was closed on the day in question not earlier than was reasonable. This would be the presumption, and it appears from the agreed facts.

The language of the Constitution which we have quoted is that if the bill "shall not be returned by the governor within five days after it shall have been presented, the same shall have the force of a law." The word "returned" in this sentence must signify

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at least a restoration of the bill to the custody of the branch of the Legislature in which it originated, at a place and under circumstances which permit that branch or some officer of it to know that the bill is so restored and to make a record of the time of such restoration when that time may become important in its future consideration. See *Orne* v. *Barstow*, 175 Mass. 193, and *Old Colony Street Railway* v. *Thomas*, 205 Mass. 529. "Returned" as used in the sentence last quoted from the Constitution is the correlative of "presented" in the same sentence, and of "laid before" in the earlier part of the same article, where it is provided that no bill shall become a law "until it shall have been laid before the governor for his revisal." It has been said that this requirement of laying before or presenting to the Governor is not satisfied in any other way than by bringing it physically before the individual who is required to exercise the power of revisal, and that a constructive or implied delivery to him falling short of this will not suffice. *Opinion of the Justices*, 99 Mass. 636. *Dimick* v. *Barry*, 211 Mass. 165.

Without deciding that the bill must be returned to the House when in session, (as that point is not necessarily involved,) it is at least essential that in order that the bill be returned to the House in which it originated, it likewise should be placed in the actual custody of the House, or at least of its clerk or other duly authorized officer. The constructive return which might be assumed under some conditions to flow from placing the bill within a room under the jurisdiction of the proper branch of the Legislature, but in the absence of any person representing it, cannot be treated as a return of a bill with the objections of the Governor in writing in the constitutional sense.

The requirement of the Constitution was not met by putting the bill with the message in the office of the clerk of the House when no one was there under the circumstances narrated. See *In re Public Utility Board*, 54 Vroom, 303.

It follows that the bill was not vetoed, and, not having been returned with the objections of the Governor to the House in which it originated within five days after it was presented to him, it had the force of law. The plaintiff is entitled to judgment.

So ordered.

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SHEPARD F. BATES *vs.* JENNIE M. KINGSLEY & others.

Hampshire. February 25, 1913. — May 24, 1913.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DE COURCY, JJ.

Devise and Legacy, Residuary clause. *Words*, "Remainder."

A widow without children wrote her will in nine clauses upon a printed form and, after a clause providing for the payment of her debts, in four clauses made pecuniary bequests disposing of $800 and three pieces of furniture, and in a sixth clause disposed of her wearing apparel. The seventh clause read as follows: "I bequeath and devise my Silver, and Jewelry as follows; To . . . [four women by name] . . .)They to divide it up between Themselves) And also the remainder if any." The eighth clause related to her funeral and the disposition of her remains, and the last clause appointed an executor. Of the four persons named, two were her nieces and with the other two her relations had been affectionate. Her feelings toward a brother were not so friendly. At the time the will was made the testatrix's only prospective heir was her father, an aged man whose support had been assumed by others. The value of the silver and jewelry mentioned in the seventh clause was $5. *Held*, that by the words "And also the remainder if any," the testatrix disposed of the residue of her property, including the real estate.

RUGG, C. J. This is a petition for the interpretation of the will of Emma L. Brewster, who died a childless widow, leaving personal property of about $1,994 and real estate of about $3,000 in value. Her will consists of nine clauses. By the first she provided for the payment of her debts. The next four gave pecuniary bequests amounting in all to $800 to three of which there was added a piece of furniture. The sixth clause disposed of her wearing apparel. The seventh, to which this petition relates, is in these words:

" I bequeath and devise my Silver, and Jewelry as follows; To Mrs. Harry Kingsley & Viva Bates — Marion Bates and Elsa W. Carlander.)They to divide it up between Themselves) And also the remainder if any." The eighth clause relates to her funeral and the disposition of her remains, and the ninth to the appointment of her executor.

The question to be decided is whether by the seventh clause the testatrix disposed of her real estate and of the residue of her personal estate, or whether that is in whole or in part intestate

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estate. There is a general presumption founded on common experience that one who makes a will intends to dispose of all his property and to leave no intestate estate. This general presumption is of some assistance in doubtful cases. *Jones* v. *Gane*, 205 Mass. 37, 43. On the other hand it has been held that a will which does not manifest an intent to dispose of the entire estate of the testator, and in which the bequests all relate to articles of furniture, books or money specified with great minuteness, concluding with the words "all the residue of my furniture and estate whatever and wherever it may be" includes "only other property and estate *ejusdem generis*," and does not dispose of real estate. *Bullard* v. *Goffe*, 20 Pick. 252. All the circumstances under which a testator executed a will may be considered in order to determine the sense in which testamentary language was used. *Polsey* v. *Newton*, 199 Mass. 450.

The present testatrix for many years had had the care of children. Her father, who was her only prospective heir at law at the time her will was executed, was far advanced in years and was not in the possession of all his faculties. He lived with one of two sons to whom his property had been conveyed upon the agreement that he should be given comfortable support during his life. This agreement seems to have been carried out. Of the four persons mentioned in clause seventh, two were her nieces. She had brought up Elsa W. Carlander from a small child and generally called her daughter, who in turn spoke of the testatrix as mother, although there was no kinship between them. Mrs. Kingsley was the wife of a nephew of the husband of the testatrix. This nephew had been brought up by the testatrix and her husband, with whom he made his home until he was married. The four were visitors at her house for considerable periods of each year.

It has been found by the single justice * that the relations between the testatrix and the four persons named in clause seventh "were affectionate and that she was fond of them, but that, for some reason, her feelings were not as friendly towards her brother Shepard, the petitioner, though the intercourse be-

* *Morton*, J., who reported the case for determination by the full court.

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tween them was in general such as might naturally be expected of brother and sister." A facsimile copy of the will, which is annexed to the record, shows that it was written by the testatrix herself upon a printed form. The total value of the silver and jewelry was about $5.

This will is an informal instrument. The seventh clause in position is where a residuary clause would be found commonly. It follows immediately after those giving pecuniary legacies and specific bequests. The donative phrase with which the clause opens, namely, "I bequeath and devise" is technically apt to dispose of real estate. The persons therein named were her dearest friends with whom for many years her association had been very intimate. Although Mrs. Kingsley and Miss Carlander were given small pecuniary legacies by earlier clauses, her two nieces were not so remembered. They would receive a small amount unless this is construed as a true residuary clause. The words, "And also the remainder if any," can have no meaning unless construed to include something more than the jewelry. There was no "remainder" of the jewelry because it all was disposed of. These words are disconnected from the other bequests of the clause, and hence naturally would be given a broad interpretation. "Remainder" is a word sufficiently comprehensive in meaning to include whatever may be left of the estate after paying the earlier bequests, including land as well as money. In its strictly legal significance, it relates to real estate. *Woodbridge* v. *Jones*, 183 Mass. 549.

These considerations are enough to distinguish the case at bar from *Bullard* v. *Goffe*, 20 Pick. 252, and to indicate a purpose to include in clause seventh not only the rest of the personal property but also the real estate of the testatrix.

Decree accordingly.

The case was submitted on briefs.

E. L. Shaw & A. J. Morse, for the petitioner.

G. P. O'Donnell, J. B. O'Donnell & W. L. Stevens, for the respondents.

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FRED L. CRESSEY *vs.* JOB H. CRESSEY & others.

Essex. March 5, 1913.—May 24, 1913.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON & DE COURCY, JJ.

Execution, Sale. *Tenants in Common. Partition. Estoppel.*

A levy and sale upon an execution of "all" the "right, title and interest" of the debtor in certain real estate described in the execution deed by metes and bounds, where the debtor's title in the real estate described is as one of several heirs of one who had died seised of several other parcels of real estate as well as the one described, while of no effect without the consent of the other heirs, is effectual, in case a portion of the premises described subsequently is set off to the judgment debtor in partition proceedings, to establish a title by estoppel in the purchaser at the sale to such interest in the portion thus set off by partition as was the judgment debtor's at the time of the sale.

PETITION for partition, filed in the Superior Court on March 17, 1911, the petitioner alleging that he and the respondents Job H. Cressey, Anna E. Emerson and Charles A. Newhall were tenants in common of certain premises on Park Street in Lynn, their undivided shares being as follows: petitioner, eight twenty-eighths, Job H. Cressey, seven twenty-eighths, Anna E. Emerson, seven twenty-eighths, and Dorman, trustee for Charles A. Newhall, six twenty-eighths; and that Arthur I. Newhall, Sarah Effie Newhall, Anna E. Emerson and Charles A. Newhall claimed to own undivided interests other than as alleged.

The case was heard by *McLaughlin*, J., without a jury. The material facts found by him are stated in the opinion. He ruled that the partition should be made in the proportions set out in the petition, made an interlocutory judgment accordingly, and reported the case for determination by this court.

G. C. Richards, for the petitioner.

H. R. Mayo, for the respondents Anna E. Emerson and Sarah E. Newhall.

W. E. Dorman, for the respondent Charles A. Newhall.

RUGG, C. J. This is a petition for partition of land on Park Street in Lynn. The question at issue is the shares to which the several owners are entitled. The material facts are that in 1899

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William M. Newhall died intestate, seized of several parcels of real estate, among them being the Park Street land which is the subject of this petition, leaving no widow and seven children. Title to all these parcels descended to his seven children as tenants in common. In 1903 on a judgment recovered against one of these children, Sarah E. Newhall, all her right, title and interest in this Park Street land described by metes and bounds was sold, and by mesne conveyances the right acquired thereby is now held by Charles A. Newhall. In March, 1904, William F. Newhall, one of the seven children, died unmarried and intestate, leaving as his heirs his six surviving brothers and sisters. Thereafter judgment was recovered against Sarah E. Newhall and Harriet A. Newhall, on execution in which all their right, title and interest in the Park Street land on July 27, 1904, described by metes and bounds, was sold, and by mesne conveyances all right under this deed has come to the petitioner. In November, 1905, commissioners were appointed by the Probate Court to make partition of the several parcels of real estate left by William M. Newhall at his decease among his six surviving children as tenants in common, the share of each being set out in the warrant as one sixth. In making partition the commissioners reported that the Park Street land, which they had appraised at $8,000, was equal to four shares, and, as in their judgment it could not be divided advantageously, they set it off to Anna E. Emerson, Sarah E. Newhall, Harriet A. Newhall and Mary I. Cressey, to each one fourth. This report was confirmed in March, 1906. Between March, 1906, and March, 1910, Mary I. Cressey deceased leaving her share to Job H. Cressey, one of the respondents. In March, 1910, Harriet A. Newhall deceased, unmarried, intestate, leaving her four surviving brothers and sisters as her heirs at law, namely Anna E. Emerson, Sarah E. Newhall, Charles A. Newhall and Arthur I. Newhall.

The levy of the two executions against Sarah E. Newhall was not upon the share held by her as tenant in common in the entire real estate inherited by her from her father. It did not follow the provisions of R. L. c. 178, §§ 13, 14. As has been pointed out, each was a levy upon all her title in only one of the several parcels held as tenants in common, which one was described by metes and bounds. The levy and sale upon execution

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of real estate of a debtor operates as a conveyance of the title which the debtor was capable of conveying. One of several tenants in common cannot as against his cotenants make a sale by metes and bounds of a portion of the common land. *Bartlet* v. *Harlow*, 12 Mass. 348. *Benjamin* v. *American Telephone & Telegraph Co.* 196 Mass. 454. Sale on execution, which is in the nature of a statutory conveyance, stands upon the same basis as a conveyance by the owner.

The case at bar is governed by *Brown* v. *Bailey*, 1 Met. 254, in which at page 257 Chief Justice Shaw said, respecting facts precisely similar to those presented in the case at bar, "such conveyance or levy, therefore, is good against the grantor and all claiming under him. If then the other cotenants release, or if upon a partition, their full shares are set off in other parts of the common estate, and the part conveyed or levied on is assigned to the party whose share has thus been conveyed or levied on by metes and bounds, such partition operates by way of estoppel and release, because no one has any longer a right to contest its validity." The principle that a conveyance by metes and bounds, whether by personal deed or statutory transfer, by one tenant in common of a portion of the common estate, although of no effect against the consent of his cotenants, operates after partition by way of estoppel to transfer the title, has been affirmed repeatedly. *DeWitt* v. *Harvey*, 4 Gray, 486, 491. *Barnes* v. *Boardman*, 157 Mass. 479. *Barnes* v. *Lynch*, 151 Mass. 510, 512. *Frost* v. *Courtis*, 172 Mass. 401, 404.

The application of this principle results in something like a wager or chance. The grantee gets nothing unless on partition the share of the grantor should happen to include the parcel described by metes and bounds in the deed. The grantor loses by estoppel and release all his interest in the parcel so described if it should happen to be set off to him.

By the partition, the interest of Sarah E. Newhall in the entire estate inherited by her both from her father and her brother, consisting of several parcels, was converted into a one fourth interest in the Park Street property. Of this one fourth she acquired six out of seven parts by inheritance of the one seventh of her father's estate. This share, or six twenty-eighths, is held by the first levy of execution, which was made before the death

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of the brother, from whom she inherited. The one sixth of one seventh which she inherited from him, constituting one out of seven parts of the one fourth of the Park Street property, or one twenty-eighth, passed under the second levy, under which also passed the entire share of Harriet. The ruling of the Superior Court as to who are the cotenants and their respective shares, was right.

Interlocutory judgment affirmed.

LOUIS COHEN *vs.* SAMUEL BERKOWITZ & trustee.

Suffolk. March 6, 1913. — May 24, 1913.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DE COURCY, JJ.

Practice, Civil, Proceedings as to report to appellate division of Municipal Court of the City of Boston, and appeal therefrom to this court, Conduct of trial: requests and rulings, Exceptions. *Municipal Court of the City of Boston. Supreme Judicial Court.*

Under St. 1912, c. 649, § 8, and Rule E of the Municipal Court of the City of Boston, no appeal lies to this court from a decision of the appellate division of the Municipal Court of the City of Boston upon a petition for the establishing of exceptions taken to rulings of the judge presiding at a trial in that court.

A memorandum of the grounds of decision, filed by the judges of the appellate division of the Municipal Court of the City of Boston in dealing with a report under St. 1912, c. 649, § 8, presenting exceptions taken at a trial before a single judge of that court, is no part of the record upon an appeal to this court from the decision of the appellate division.

The record in this court on an appeal from a decision of the appellate division of the Municipal Court of the City of Boston under St. 1912, c. 649, § 8, should show the dates of the filing of all papers material to the record.

If the appellate division of the Municipal Court of the City of Boston, in dealing under St. 1912, c. 649, § 8, with a report of exceptions taken at a trial before a single judge of that court, decides that there was no prejudicial error in the rulings complained of, the order should be, "report dismissed." In this case an order made in the form, "Judgment for the defendant upon the finding ordered," while informal, was held to be in substance a dismissal of the report.

In an action of tort for an alleged conversion, tried in the Municipal Court of the City of Boston, certain requests for rulings involving findings of facts upon conflicting evidence were held properly to have been refused.

TORT for the alleged conversion of certain stoves sold by the plaintiff to a mortgagor in possession of certain real estate

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of which the defendant was mortgagee. The defendant foreclosed the mortgage and, it was alleged, tortiously "took possession of" the stoves and converted them to his own use. Writ in the Municipal Court of the City of Boston dated September 3, 1912.

The case was tried in the Municipal Court before *Parmenter*, J., who found for the defendant. The plaintiff filed a draft of a report to be presented to the appellate division of the court under St. 1912, c. 649, § 8. The judge signed an amended report, and the plaintiff thereupon filed a petition to prove the truth of his exceptions, which was heard by the appellate division of the court, who upon that subject made the ruling, "No purpose will be served by establishing the plaintiff's form of report."

On the merits of the case the appellate division ordered "Judgment for the defendant upon the finding ordered," filing a memorandum with the order.

The plaintiff appealed to this court, and there were printed in the record before this court, besides the report of the trial judge and the judgment of the appellate division and the appeal therefrom, the draft report filed by the plaintiff, the plaintiff's petition for the establishment of his exceptions, and the memorandum of the judges of the appellate division filed with their judgment.

Rule E of the rules of the Municipal Court of the City of Boston, adopted under St. 1912, c. 649, § 8, is as follows:

"Establishment of reports: Whenever a claim of report shall be disallowed by a justice of this court as not conformable to the facts, or whenever any justice shall fail to allow such report by reason of physical or mental disability, death or resignation, or if for any other cause action on said report is unduly delayed, the party seeking the same may within three days after notice of such disallowance or such time as the appellate division may allow in any other such case, file with the clerk his petition, verified by affidavit, setting forth in full his claim for such report and all facts material thereto, and shall forthwith give notice to the adverse party by delivering to him, or his attorney of record, a copy of said petition. No party shall be allowed to establish the truth of any such allegations if he has failed to comply with the requirements herein prescribed. The matter shall upon motion

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be assigned for hearing and disposition by the appellate division, either before said appellate division or one or more justices of the court other than the justice whose ruling is complained of, and if heard before said division, final action thereon may be taken in like manner as though said cause had been heard by said division upon the merits of the questions sought to be presented."

Other material facts are stated in the opinion.

M. H. Steuer, for the plaintiff.

J. F. Sullivan, for the defendant, was not called upon.

RUGG, C. J. This is the first case which has come before us under the provisions of St. 1912, c. 649. The purpose of this act is to provide a more expeditious determination of cases in the Municipal Court of the City of Boston, and a decision by appeal directly to this court on questions of law there raised.

One or two matters of practice lie at the threshold. The defendant filed a draft report in the municipal court. Afterwards, the judge before whom the case was tried, without passing upon the report filed by the aggrieved party, made an amended report. There is a faint intimation that the defendant may have agreed to the amended report. But thereafter he filed a petition to the judges of the appellate division of the municipal court asking that the truth of his exceptions taken before the single judge be established. There is nothing to indicate when this was filed. St. 1912, c. 649, makes no definite provision touching the proof of the truth of reports disallowed by the judge before whom the case is tried; but § 8 contains this language: "The court shall make rules regulating the procedure and sittings of the appellate division, for the preparation and submission of reports and the allowance of reports which a single justice shall disallow as not conformable to the facts. . . ." Pursuant to this authority, the judges of the municipal court have adopted certain rules, "E" of which relates to the establishment of reports. The substance of this rule is that petitions for the establishment of the truth of reports shall be determined by the appellate division, or other judge or judges assigned therefor. This rule means, in conjunction with the statute, that the truth of the report shall be passed upon finally and only in this way. The provisions of R. L. c. 173, § 110, for the establishment of exceptions taken in the Superior or Supreme Judicial Court by this court sitting *in*

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banc are inapplicable to this procedure. This is in accord with the main and salutary purpose of the act, which is to expedite and make as inexpensive as is reasonably possible the final determination of questions of law arising in causes heard in the Municipal Court of the City of Boston. It is irregular, therefore, to print, as has been done in this case, the petition for the establishment of the truth of the report originally filed by the defendant. Its truth or falsity can be determined in the municipal court alone.

Upon the argument of the case before the appellate division, the judges filed what is termed "Opinion and Final Order," copy of which is printed in the record. Such opinion is no part of the record. It has been decided many times that a decision or memorandum by a judge of the Superior Court or a single justice of this court, in an action of law is no part of the record. *Cressey* v. *Cressey*, 213 Mass. 191. *Given* v. *Johnson*, 213 Mass. 251. *Regal* v. *Lyon*, 212 Mass. 230, 231. The same principle applies to the proceedings under this chapter. While such an opinion may serve a useful purpose, and be valuable to the parties, it is no part of the record upon which the case is to be argued in this court.

A further matter of detail as to the form of the papers is that the record shows no dates of filing of the several papers. The record presented to this court should show the dates upon which the material papers have been filed. The record also shows in this case that the decision of the appellate division was "Judgment for the defendant upon the finding ordered." Section 8 of the act provides that, "if the appellate division shall decide that there has been prejudicial error in the ruling complained of, it may reverse, vacate or modify the same or order a new trial in whole or part; otherwise it shall dismiss the report." The action of the appellate division, although not following the words of the statute, was in substance a dismissal of the report. From that would follow the entry of final judgment in accordance with the determination of the trial judge.

The case upon the merits may be disposed of briefly. Whether the draft of the plaintiff, or the amended report signed by the judge be accepted as true, makes no difference as to the result. No error is disclosed. It is an action of tort for the conversion of stoves placed in buildings. The title to the stoves remained in

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the plaintiff, although they were sold to one Greenbaum upon a conditional contract of sale. The defendant by virtue of a mortgage took possession for breach of condition of the real estate upon which were the stoves, and sold it under the power of sale. The trial judge found that the defendant had not refused to allow the plaintiff to take possession of the stoves or remove them from the premises, and had exercised no act of dominion over them, and that the plaintiff assented to the auction sale of the premises, and that at such auction it was publicly announced that the stoves were not included in the sale and were included in an omnibus exception from the memorandum of sale. It cannot be said that these findings of fact were not warranted. Assuming the statements in the draft report to be true, there was a conflict of evidence touching these points, and the judge found for the defendant. Under these circumstances it is plain that no error of law was committed in refusing to rule, in accordance with the plaintiff's first request, that he was entitled to recover. His fifth request, to the effect that "the acts of the defendant in refusing to let the plaintiff remove the property was in law a conversion, and made the defendant liable for the full value of the property," plainly could not have been given in view of the facts found by the judge. It is not a request for a ruling of law, but for a finding of fact. The sixth request was based also upon an assumption of facts which is contrary to the finding of the judge.

Judgment affirmed.

BOARDMAN J. PARKER *vs.* WALTER F. MURPHY.

Suffolk. March 7, 1913. — May 24, 1913.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DE COURCY, JJ.

Audita Querela. Bankruptcy. Practice, Civil, Appeal.

If the defendant in an action of contract in the Superior Court, after the service of the writ upon him, files a petition to be adjudicated a bankrupt under the national bankruptcy act and is so adjudicated, but does not set up the pendency of the bankruptcy proceedings in the action in the Superior Court or seek a postponement of those proceedings pending the determination of the question

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of his discharge in bankruptcy, and if a judgment is rendered against him in the Superior Court and thereafter he obtains his discharge in bankruptcy, *it is doubtful* whether he can maintain a writ of audita querela to prevent the enforcement of an execution issuing on such judgment.

Audita querela is a common law writ, and, by R. L. c. 192, § 1, the rules of practice applicable to it are those prevailing in actions at law. Thus the findings of fact made by a judge of the Superior Court at the trial of such a writ are not to be revised, if there is any evidence to warrant them.

Where the plaintiff in an audita querela contends that he is entitled to have proceedings on an execution in an action at law against him enjoined because of a discharge in bankruptcy obtained on a petition filed by him after the bringing of the action at law, and it appears that he gave no notice of the bankruptcy in the action at law, and that the name of the plaintiff in the action at law is given in the schedule which he filed with his petition in bankruptcy as of a "residence unknown," the burden is upon him to prove that the plaintiff in the action at law received notice of the pendency of the bankruptcy proceedings in season to prove his claim there and object to a discharge. On the foregoing facts, with other evidence, a finding of a judge that such burden had not been sustained was held to be warranted.

RUGG, C. J. This is a writ of audita querela. The plaintiff asks relief from a judgment, recovered by the defendant against him, on the ground that the debt on which that judgment was founded was barred by the plaintiff's discharge in bankruptcy. The undisputed facts are that an action at law in the Superior Court on three promissory notes was brought by the defendant against the plaintiff. Thereafter, while this action was pending, the plaintiff after filing his petition therefor was adjudicated a bankrupt. The fact of bankruptcy was not pleaded in the action at law and was in no way called to the attention of the court, and in due course judgment was entered in favor of this defendant against the plaintiff. Afterwards, the plaintiff received his discharge in bankruptcy.

It is established that a writ of audita querela will not avail a complaining party who has had a legal opportunity of defense, or where the alleged wrongful judgment from which he seeks release is attributable to his own neglect. *Lovejoy* v. *Webber*, 10 Mass. 101, 103. *Radclyffe* v. *Barton*, 161 Mass. 327, and cases cited at 331. It is at least doubtful whether upon these facts the plaintiff is entitled to maintain his writ. It is true that the present federal bankruptcy act (U. S. St. 1898, c. 541, § 11) makes compulsory a stay of an action, pending upon a claim to which a discharge in bankruptcy would be a bar, only until after an adju-

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dication upon or dismissal of the petition in bankruptcy. Further stay for a period of twelve months, or until the question of discharge is determined, if application therefor is made within such time, is discretionary with the court. *Feigenspan* v. *McDonnell*, 201 Mass. 341, 346. Nevertheless, in the simple action at law upon a claim to which a discharge in bankruptcy would be a bar, where no rights of or against third persons are involved, such as existed for instance in *Rosenthal* v. *Nove*, 175 Mass. 559, and no ulterior interests are affected, the usual procedure is for the bankrupt to plead the pendency of bankruptcy proceedings and ask for a continuance until he can obtain and plead his discharge. This is pointed out in *Rogers* v. *Abbot*, 206 Mass. 270, 274. See also *Faxon* v. *Baxter*, 11 Cush. 35. If the present plaintiff had pursued that course it is highly probable that no judgment would have been rendered against him. We do not rest the decision upon this ground, as neither party has argued it, but proceed to consider the case upon its merits.

The case was heard at length by a judge of the Superior Court,* who found in substance that the debt due from the plaintiff to the defendant was not "duly scheduled in the schedules of the debts of the bankrupt, the residence having been given therein as unknown, and the burden being upon the plaintiff to establish the allegation . . . that he 'did all things required to be done under and by virtue of the bankruptcy laws of the United States to give notice to the respondent of his proceedings in bankruptcy,'" found "upon all the evidence he has not proven that fact or that the respondent had actual knowledge of the proceedings in bankruptcy." After making these findings of fact, the judge found generally for the defendant and then reported the case to this court, presenting the question, "whether or not upon all the evidence the discharge in bankruptcy of the complainant discharged the claim of the respondent, including thereunder the question of whether or not all the requirements of the bankruptcy act were complied with by said complainant or that the creditor, said respondent, had notice or actual knowledge of the proceedings in bankruptcy so as to make said discharge effective as against the claim in the hands of said respondent. If from

* *Stevens*, J.

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all the evidence herein the discharge in bankruptcy affects the respondent's claim, then the respondent is to be granted a new trial; otherwise, if the finding of the trial judge was right the same is to be affirmed."

An audita querela is a common law writ, and by R. L. c. 192, § 1, the forms of process shall be those heretofore established and the "proceedings so far as appropriate shall be the same as in personal actions," that is, as in actions at common law. See R. L. c. 173, § 1. Although the nature of the remedy is equitable, the rules of practice applicable to it are those prevailing at common law. Upon this report, therefore, the question presented is, as in the ordinary action at law, whether there was any evidence warranting the findings of the judge, which are not to be set aside unless wholly unsupported. His decision of questions of fact is not to be revised.

Section 17 of the bankruptcy act provides that a discharge in bankruptcy shall release the debtor from all provable debts "except such as . . . have not been duly scheduled . . . unless such creditor had notice or actual knowledge of the proceedings in bankruptcy." Claims are not duly scheduled unless the names of the debtor's "creditors showing their residences, if known," are on the list of creditors filed. Section 7, cl. 8. The burden of proving that he did all things required of him under the bankruptcy law to give notice to the respondent creditor of the bankruptcy proceedings or that the latter had actual knowledge of them rests upon the plaintiff in this case. *Wylie* v. *Marinofsky*, 201 Mass. 583. *Wineman* v. *Fisher*, 135 Mich. 604, 608.

The requirement for duly scheduling the names and residences of creditors is a most important one. It is in compliance with the generally recognized principle that one shall not be barred of his claim without the opportunity of having his day in court. It is for the benefit of the creditors and in the interest of fair dealing with them and is to be construed in harmony with this purpose. It is essential in order that notices in the bankruptcy proceeding may be sent him. It has been construed with some strictness. *Birkett* v. *Columbia Bank*, 195 U. S. 345. *Custard* v. *Wigderson*, 130 Wis. 412.

It seems plain that the finding that the debt from the plaintiff to the defendant was not properly scheduled was not unsupported

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by the evidence. The plaintiff knew that the defendant's action at law against him had been brought about eleven months before his petition in bankruptcy and was pending against him. It is common knowledge that the residence of the plaintiff is stated in the ordinary writ and in the summons or copy handed to the defendant. A simple reference to a paper presumably in his possession or to a court record of the existence of which he was well aware would have furnished him with the information as to the creditor's residence. An inference by the trial judge under these circumstances that the debtor knew the residence of his creditor would have been justified. But whether this inference was drawn or not, there was evidence that the debtor failed to avail himself of information close at hand. A finding would have been warranted that he might have ascertained the residence by the exercise of the reasonable diligence which the importance of the subject imposed upon him. The want of knowledge which will excuse a debtor from putting the residence of his creditor in the list is not that which may exist without attempt to gain the information, but that which arises after reasonable effort has been made to find out. Clearly the finding that the creditor did not have notice or actual knowledge of the bankruptcy proceedings was warranted by the evidence.

Judgment for the defendant affirmed.

The case was submitted on briefs.

H. L. Baker & F. K. Rice, for the plaintiff.

J. E. Crowley, for the defendant.

LOUISE M. BROWNE *vs.* MAUD F. BROWNE.

Norfolk. March 10, 1913. — May 24, 1913.

Present: RUGG, C. J., HAMMOND, LORING, SHELDON, & DE COURCY, JJ.

Writ of Entry. Land Court. Superior Court. Constitutional Law. Words, "Action to recover possession."

The "action to recover possession" of land upon which a levy of execution has been made as fraudulently standing in the name of a person other than the

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judgment debtor, which under R. L. c. 178, § 47, it is necessary for the judgment creditor to commence within one year after the return day of the execution, is a writ of entry in the ordinary form; and under St. 1904, c. 448, jurisdiction of such an action is in the Land Court and not in the Superior Court.

Section 1 of St. 1911, c. 433, gives to the Superior Court power to order transferred to the Land Court a writ of entry wrongly begun in the Superior Court in 1909, in which the tenant has appeared, answered and claimed a trial by jury; and such statute is constitutional.

The provisions of St. 1910, c. 560, relating to the framing of issues for a jury in cases entered in the Land Court and the transfer of the cases to the Superior Court for trial by a jury before any trial in the Land Court, which by § 8 are not to apply to any cause pending at the time of the enactment of the statute, do not apply to a writ of entry wrongly entered in the Superior Court in 1909 and under St. 1911, c. 433, § 1, transferred to the Land Court on November 9, 1911; but such case is governed by the procedure prescribed by St. 1904, c. 448, and, in order to have a trial by jury of a question of fact, a party, within thirty days after a hearing and a decision adverse to him in the Land Court, must file in the Land Court an appeal to the Superior Court and have jury issues for the trial in the Superior Court framed in the Land Court.

The mere filing in the Land Court, within thirty days after a decision of the judge of that court, of a motion for jury issues to be tried in the Superior Court, does not amount to a claim of appeal under St. 1904, c. 448, § 8.

WRIT OF ENTRY in the Superior Court dated October 23, 1909.

On December 13, 1909, the tenant appeared and claimed a trial by jury. On December 31 she filed an answer.

On November 9, 1911, the demandant filed a petition in the Superior Court under St. 1911, c. 433, for a removal of the case to the Land Court. The petition was allowed; and the tenant appealed. On November 15, 1911, on motion of the demandant in the Superior Court, the appeal was dismissed; and the tenant appealed.

On January 18, 1912, in the Land Court a motion by the tenant for specifications was denied; and the tenant appealed.

On January 18, 1912, a motion of the tenant in the Land Court for jury issues was denied by *Davis*, J., who on the following day filed a memorandum calling attention to the fact that the procedure in the case must be under St. 1904, c. 448. The closing sentence of the memorandum, referred to in the opinion, was as follows: "The case must be assigned for trial. If after a decision here either party is aggrieved an appeal can be taken for a jury trial on the facts in the Superior Court upon issues to be framed therefor in accordance with the provisions of St. 1904, c. 448, § 8." The tenant appealed.

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A motion of the demandant for an assignment of the hearing then was allowed; and the tenant appealed.

A plea to the jurisdiction by the tenant was overruled; and the tenant appealed and excepted.

In the Land Court, *Davis*, J., filed a decision for the demandant on July 29, 1912, from which the tenant appealed "to the Supreme Judicial Court" on August 15, 1912, and on the same day filed in the Land Court a bill of exceptions thereto and a motion for "issues to be framed for a jury trial on the facts in the Superior Court."

The motion for jury issues was presented to the court on November 5, 1912, and was denied; and the tenant appealed.

On December 30, 1912, a motion of the tenant in arrest of judgment was denied; and the tenant appealed.

J. S. Richardson & J. M. Browne, for the tenant, submitted a brief.

L. R. Chamberlin, for the demandant.

RUGG, C. J. This is a writ of entry brought in the Superior Court in 1909. Thereafter, that court ordered it transferred to the Land Court under St. 1911, c. 433. The first question is, which court has jurisdiction. This depends upon the construction of St. 1904, c. 448, to the effect that the jurisdiction of "writs of entry, under the provisions of chapter one hundred and seventy-nine" of Revised Laws is transferred from the Superior to the Land Court. It appears from the record that the demandant's title rests upon the levy of an execution on lands belonging to one Merrill H. Browne, the record title of which stood fraudulently in the name of the tenant. R. L. c. 178, § 47, enacts that in such case the levy shall be void unless an "action to recover possession" of the land is begun within one year from the return day of the execution. Such "action" is a writ of entry in the ordinary form. *Clark* v. *Chamberlain*, 13 Allen, 257, 260. It plainly is within the terms of R. L. c. 179. Therefore jurisdiction of the action was in the Land Court and not in the Superior Court at the time it was brought. *First Congregational Society* v. *Metcalf*, 193 Mass. 288.

It was properly transferred to the Land Court under St. 1911, c. 433, § 1 of which provides that, "if an action has been brought in the Superior Court which ought to have been brought in the

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Land Court, . . . the court may . . . order the action . . . transferred to the . . . [Land Court] . . . ; and it shall thereupon be entered and prosecuted as if it had been commenced therein, and all prior proceedings otherwise regularly taken shall thereafter be valid." This relates merely to procedure. It is in furtherance of a policy frequently exemplified in legislative acts to enable a party who has brought a cause seasonably to try it upon its merits, notwithstanding defects in the form or substance of pleadings, or error in the remedy asked, or mistake in the tribunal invoked, rather than to compel him to begin it anew. *George* v. *Reed*, 101 Mass. 378. The statute at bar is well within principles established by this court, and is constitutional. *Wilson* v. *Head*, 184 Mass. 515. *Rogers* v. *Nichols*, 186 Mass. 440. *Converse* v. *Ayer*, 197 Mass. 443, and cases cited at 454. *Adams* v. *Adams*, 211 Mass. 198. *Ewell* v. *Daggs*, 108 U. S. 143. It falls far short of some statutes which have been held valid, although they have been thought to go to the verge. See for example, *Dunbar* v. *Boston & Providence Railroad*, 181 Mass. 383. Where a plaintiff has not slept upon his rights, but has mistaken the jurisdiction of the tribunal to which he has appealed, no constitutional right is impaired by permitting the court in which the action wrongly was brought to transfer it to the one having power to adjudicate upon it.

The terms of the statute under which the transfer was made to the Land Court required the procedure to be "as if it had been commenced therein." This fixes the date of the writ for the ascertainment of the procedure to be followed in the Land Court. Hence, this writ having been brought in 1909, St. 1904, c. 448 governs, and not St. 1910, c. 560, which in § 8 exempts pending causes from its operation. The case at bar was pending in 1910. Under St. 1904, c. 448, § 8, it is only after a decision by the Land Court of all issues raised that appeal can be taken to the Superior Court for a jury trial on the facts. This was pointed out in the memorandum of the judge of the Land Court filed in this case on January 19, 1912. After the decision of the Land Court, the tenant did not appeal to the Superior Court and enter his appeal there, but merely filed a motion on August 15 to have issues for a jury framed, which was not presented to the court until November 5, 1912. This did not amount to a claim

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of an appeal under St. 1904, c. 448, § 8. *Weeks* v. *Brooks*, 205 Mass. 458. *Mead* v. *Cutler*, 194 Mass. 277, is plainly distinguishable in respect of the conduct of the appealing party. The motion for framing issues is a subsidiary subject, depending for its validity upon an appeal. The motion was properly denied, inasmuch as the tenant had failed to take any appeal.

No error is disclosed upon the report. What has been said disposes of all the numerous pleas, appeals and exceptions of the tenant, or renders them immaterial.

Exceptions overruled; appeals dismissed.

JOHN P. SHEA *vs.* JAMES H. VAHEY & another.

Suffolk. March 10, 1913. — May 24, 1913.

Present: RUGG, C. J., HAMMOND, LORING, SHELDON, & DE COURCY, JJ.

Bills and Notes, Liability of indorsers. *Contract*, In writing. *Evidence*, Extrinsic affecting writings.

In an action brought on behalf of one indorser of a note against one of two other indorsers, the defendant may be allowed to show that the indorsements were for accommodation and that by an oral agreement among the indorsers his liability in no event was to exceed one third of the amount at any time due on the note; and if such an agreement is proved, his liability is governed thereby irrespective of the order in which the indorsers signed the note.

If a promissory note is payable to the order of the maker and is indorsed in blank by the maker and by several accommodation indorsers, who orally have agreed among themselves as to the proportions for which they shall be liable in case of a default by the maker, and one of the accommodation indorsers, after a default by the maker, pays the entire amount due on the note to the holder and then writes above the indorsements on the note the words, "Pay to the order of" an agent of such indorser, *it seems*, that an action in the name of the agent against another of the indorsers cannot be maintained upon the note, the remedy of the indorser who paid being by an action upon the oral agreement of the indorsers for contribution.

CONTRACT, against James H. Vahey (hereinafter called the defendant) and the Plymouth Stove Foundry Company, upon a promissory note of that company payable to its own order and indorsed to the plaintiff by the company, the defendant Vahey,

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Mary A. Gavin (afterwards Fenton), Thomas J. Gavin and Jennie A. Gavin. Writ dated July 10, 1908.

In the Superior Court the case was tried before *Wait*, J. The Plymouth Stove Foundry Company was defaulted and judgment was entered against it under Rule 23 of the Superior Court.

It appeared that the note, having been indorsed by all the indorsers in blank, had been discounted by the Union Market National Bank.

The plaintiff contended, and there was evidence to support his contentions, that the Union Market National Bank had sold the note to one Gleason, who had brought the action through the plaintiff as his agent.

The defendant contended and his evidence tended to show that Mrs. Fenton, one of the accommodation indorsers of the note, having borrowed the necessary amount from one Gleason, caused R. W. Sawyer, Jr., Esquire, who was associated with the firm of Brandeis, Dunbar and Nutter, her attorneys, to pay to the Union Market National Bank the amount due upon the note, the bank by its cashier signing a receipt as follows: "Received of R. W. Sawyer, Jr., twenty-four hundred ninety-six dollars for which sum we have this day sold and delivered to him a note for $2250, signed by Plymouth Stove Foundry Co. dated Apr. 23, 1906, and maturing Aug. 23, 1906." The words "Pay to the order of John P. Shea" then were written above the indorsements on the back of the note and this action was brought.

The defendant also, subject to an exception by the plaintiff, was allowed to introduce evidence tending to show that there had been an agreement among the indorsers at the time of the indorsements that the liability of each should not exceed one third of the amount due on the note.

In his charge, the judge instructed the jury in part as follows: "If Mr. Gleason is the owner, the verdict should be for the full amount and interest. If Mrs. Fenton is the real owner, and no agreement with regard to Mr. Vahey's liability was entered into, or if no such agreement is proved by a fair preponderance of the evidence, then the verdict is for the plaintiff for the full amount and interest. If the agreement testified to by Mr. Vahey was made, then Mrs. Fenton is entitled to recover one half of the amount of the note and interest, if the agreement was that they

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were to share equally. If it was not that, but was made, and Mr. Vahey's liability was to be one third, and Mrs. Fenton is the owner, then she is entitled to recover one third the full amount and interest."

The plaintiff excepted to portions of the charge as follows:

"1. As to so much of the charge as permitted the jury to find a verdict for the plaintiff for less than the full amount of the note.

"2. As to so much of the charge as permitted the jury to find a verdict as small as one third of the amount of the note.

"3. As to so much of the charge as leaves it possible for the jury to find a liability of one third of the amount of the note."

The jury found for the plaintiff in the sum of $891.62, being one third of the amount of the note with interest. The plaintiff alleged exceptions.

E. F. McClennen, for the plaintiff.

G. L. Mayberry, (*P. Mansfield* with him,) for the defendant Vahey.

RUGG, C. J. There was evidence from which it might have been found that the plaintiff was simply the agent of one of the indorsers of the note in taking up the note after maturity and in bringing this action.

The defendant was the first of the four indorsers upon the note. The true relation as between themselves of parties liable on a note may be shown by oral evidence in actions between them to determine their respective obligations. It is only in the absence of proof to the contrary that the law fixes the legal effect of their liability on the instrument in accordance with the order of the signatures. *Enterprise Brewing Co.* v. *Canning*, 210 Mass. 285. When an outside agreement is proved, the rights of the parties as to each other are fixed in accordance with its terms regardless of the order in which the signatures appear on the note. *Lewis* v. *Monahan*, 173 Mass. 122. There was ample evidence to support a finding that the indorsers, of whom there were three at the outset, agreed before signing the original note that they should share equally whatever they might be required to pay on it, and that later when the wife of one of the three signed a renewal of the original note, making four indorsers, it was agreed that the proportion of liability of the defendant should remain the same. The jury, as shown by the verdict, believed that this agreement

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was made. The plaintiff technically was not entitled to recover on the note. The action should have been by the indorser who has paid for contribution upon the oral agreement. The rulings were sufficiently favorable to the plaintiff.

Exceptions overruled.

GIUSEPPE GUARINO *vs.* MICHELE RUSSO.

Suffolk. March 11, 1913. — May 24, 1913.

Present: RUGG, C. J., HAMMOND, LORING, SHELDON, & DE COURCY, JJ.

Malicious Prosecution. Trustee Process. Practice, Civil, Amendment.

The Superior Court has no power, after the commencement by trustee process of an action of tort for conversion and malicious use of civil process, to allow amendments changing the writ to one of summons and attachment and adding to the declaration a count for malicious prosecution, because the allowance of such an amendment would establish conclusively that the action originally was intended to be brought for malicious prosecution, and under R. L. c. 189, § 1, the court has no jurisdiction of such an action brought by trustee process.

TORT, the original declaration containing four counts, the first two counts being for conversion of money, the third count for false arrest and the fourth for malicious use of civil process. Writ of trustee process dated March 19, 1908.

In the Superior Court the case was tried before *Fessenden,* J. After the trial had begun, the presiding judge, subject to exceptions by the defendant, allowed a motion by the plaintiff to amend his writ from a writ of trustee process into a writ of summons and attachment, and thereafter allowed another motion of the plaintiff to add to his declaration a fifth count for malicious prosecution.

The jury found for the plaintiff in the sum of $47.48 on the first count, for the defendant on the second, third and fourth counts, and for the plaintiff in the sum of $900 on the fifth count.

The defendant alleged exceptions.

J. Lowell & K. Howes, for the defendant.

W. R. Buckminster, (*J. E. Crowley* with him,) for the plaintiff.

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RUGG, C. J. The decisive question presented in this case is whether an action of tort begun by trustee process can be amended by striking out the portions of the writ which make it trustee process, so as to enable it to be maintained for malicious prosecution. The determination involves a construction of statutes. There is no inherent or constitutional reason why such amendments cannot be allowed. The only inquiry is whether the Legislature permits such amendments.

R. L. c. 189, § 1, provides that "all personal actions, except actions of tort for malicious prosecution, for slander or libel or for assault and battery and actions of replevin, may be commenced by the trustee process." This language is an unequivocal prohibition against the commencement of an action for malicious prosecution by trustee process. It has been the continuous statute of the Commonwealth touching actions of this sort since St. 1794, c. 65, § 1. See Rev. Sts. c. 109, §§ 1, 17; Gen. Sts. c. 142, §§ 1, 75; Pub. Sts. c. 183, § 1. R. L. c. 173, § 48, which authorizes the allowance of any "amendment in matter of form or substance . . . which may enable the plaintiff to sustain the action for the cause for which it was intended to be brought, or which may enable the defendant to make a legal defense" must be interpreted in the light of this express inhibition. Within its field the statute permitting amendments is given a broad and liberal interpretation; but it cannot override other equally clear statutes.

The commencement of an action means *prima facie* the date of the writ. *Gardner* v. *Webber*, 17 Pick. 407, 412. Subsequent amendments adding new counts are allowable to enable the plaintiff to sustain the cause of action for which he intended to bring his writ, and the allowance of an amendment by the trial judge conclusively establishes the existence of that initial intent. R. L. c. 173, § 121. *Tracy* v. *Boston & Northern Street Railway*, 204 Mass. 13. Therefore the situation is that the plaintiff commenced his action by trustee process, then intending to include within its scope an action for malicious prosecution, although the count setting out this ground was added later.

The explicit prohibition of the statute against commencement by trustee process of actions for malicious prosecution goes to the validity of the action and to the jurisdiction of the

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court. It cannot be cured by amendment. *Hall* v. *Hall*, 200 Mass. 194.

It is not necessary to review the numerous cases where this court has given a liberal construction to the statute allowing amendments. Such is its settled policy in interpreting and applying remedial statutes. But when the Legislature has seen fit expressly to prohibit the commencement of any action by a specified process, it is not reasonably possible to circumvent that plain mandate by the allowance of an amendment, which would transform the action into one of the prohibited kind. See *Church* v. *Phillips*, 157 Mass. 566.

The exceptions must be sustained unless the plaintiff within fifteen days from the date of the rescript is permitted to amend his declaration by striking out the fifth count of his declaration and files a remittitur of the amount awarded as damages on that count.

So ordered.

LUKE LONG *vs.* QUINN BROTHERS, Incorporated.

Suffolk. March 11, 1913. — May 24, 1913.

Present: RUGG, C. J., HAMMOND, LORING, SHELDON, & DE COURCY, JJ.

Practice, Civil, Appeal, Removal from State court to United States court.

An order of the Superior Court granting a petition for the removal of an action entered therein to a district court of the United States is a final judgment which disposes of the whole case in the Superior Court, and an appeal lies therefrom which brings before this court the question, whether, as a matter of law on the face of the record, the case is a proper one for removal.

An action brought in a State court is not one "arising under the Constitution or laws of the United States," so that the defendant would be entitled as a matter of law to have it removed to a United States court, unless it appears to be such from the plaintiff's statement of his cause of action in his writ, declaration, petition or other pleading; and if the plaintiff's pleadings at the time when the petition for removal is filed fail to disclose such an action, the defendant cannot prove it to be such upon averments in his petition for removal. In the present case averments in such a petition by the defendant failed to show that the plaintiff's cause of action arose under the Constitution or laws of the United States.

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RUGG, C. J. This is an appeal from an order of the Superior Court accepting the defendant's petition and bond for the removal of the cause from the Superior Court to the District Court of the United States for the District of Massachusetts. It is conceded by the defendant that this appeal is taken properly under R. L. c. 173, § 96, as amended by St. 1910, c. 555, § 4, and that the order allowing the petition for removal is a final judgment which disposes of the whole case. The matter is properly before us. *Cotter* v. *Nathan & Hurst Co.* 211 Mass. 31. *Ellis* v. *Atlantic & Pacific Railroad,* 134 Mass. 338.

This is an action of tort. The plaintiff in his writ is alleged to be a resident of Boston, and the defendant a corporation organized under the laws of this Commonwealth, having its usual place of business at Boston. The declaration is for personal injuries alleged to have been received through the negligence of the defendant. The petition for the removal to the District Court of the United States avers that the plaintiff is an alien, being a citizen of Newfoundland "and, therefore, a foreign citizen or subject; and that your petitioner, Quinn Bros., Inc., which is a corporation duly organized under the laws of the Commonwealth of Massachusetts, was at the time of the commencement of this suit and still is a citizen of the Commonwealth of Massachusetts, and of a state, and that this suit is therefore one of a civil nature arising under the laws of the United States, of which the District Courts of the United States are given original jurisdiction by an act to codify, revise and amend the laws relating to the judiciary." The only reason set out upon this record for removal is diversity of citizenship. Under U. S. St. 1911, c. 231, known as "The Judicial Code," (§ 296), the right of removal on the ground of diversity of citizenship is confined to a defendant or defendants who are non-residents of the State in whose court the action is brought. See § 28.

The defendant asks leave to amend its petition for removal so as to set out the fact that the action is "one of a civil nature arising under the laws of the United States in that the plaintiff contests the validity of a writ, order, judgment or decree of the Circuit Court of the United States for the District of Massachusetts, which said court in an action brought by this plaintiff against this defendant for the same cause of action as (according to

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your petitioner's best information and belief) that for which this suit was brought ordered a judgment for the defendant." We assume in favor of the defendant, but without so deciding, that its petition for removal may be treated as thus amended.

The Judicial Code in the respects here involved does not differ in substance from the previous statute, (see 25 U. S. Sts. at Large, 433, 434,) and decisions made under that act are equally applicable now. The practice as to removals of causes from State to Federal courts has become fairly well settled. When a petition and bond are filed, it is the duty of the State court to determine whether on the face of the record a cause for removal is made out. If any issues of fact are raised these cannot be tried in the State court but must be heard and determined in the Federal court upon a petition to remand. *Duff* v. *Hildreth*, 183 Mass. 440, 442, and cases cited.

The question, whether a cause for removal is made out as matter of law upon the face of the record, is one which the State court must consider and decide. *Stone* v. *Sargent*, 129 Mass. 503, 508. The point to be determined is whether the action at bar is one "arising under the Constitution or laws of the United States." It was said in *In re Winn*, 213 U. S. 458, at 465, "It is the settled interpretation of these words, as used in this statute conferring jurisdiction, that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough, as the law now exists, that it appears that the defendant may find in the Constitution or laws of the United States some ground of defense. . . . If the defendant has any such defense to the plaintiff's claim it may be set up in the State courts, and if properly set up and denied by the highest court of the State may ultimately be brought to this court for decision." Although in some respects the scope of *In re Winn*, 213 U. S. 458, has been narrowed in *Ex parte Harding*, 219 U. S. 363, its binding force in the respect of the language just quoted cannot be challenged.

The character of a cause of action, for the purpose of ascertaining whether it involves a controversy touching a right arising under the Constitution or laws of the United States and hence removable, must be determined by the plaintiff's statement of it

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in his writ, declaration, petition or other pleading. If the plaintiff's pleadings, at the time the petition for removal is filed, fail to disclose a suit which might have been brought in the Federal court because growing out of the Constitution or laws of the United States, the defendant cannot supplement the record by averments of a right which may arise under such Constitution or laws. *Matter of Dunn*, 212 U. S. 374, 384. *Coyle* v. *Stern*, 113 C. C. A. 450, 452, and cases cited. This proposition is supported by affluent citation of authorities in *Louisville & Nashville Railroad* v. *Mottley*, 211 U. S. 149, at 154.

It is plain that the plaintiff's declaration sets out no cause of action under the laws of the United States. It seems equally plain that the allegations of the proposed amendment of the defendant's petition for removal fail to show that the plaintiff's cause of action arises under the laws of the United States. Giving it full force, it appears to set up *res judicata*. This is a defense and no part of the plaintiff's cause of action. It is a defense which, when pleaded respecting a judgment rendered in a court of the United States, raises a question under the full faith and credit clause of the Federal Constitution, which must be decided in the first instance by the State court, whose decision in proper cases may be reviewed by the Supreme Court of the United States on writ of error. But whether the defense is *res judicata* or some other is of slight consequence. On the strength of the decisions of the Supreme Court of the United States which have been cited, it appears to be clear as matter of law that this is not a proper case for removal to the District Court of the United States.

Order accepting petition and bond for removal reversed.

J. L. Keogh, for the plaintiff.

E. C. Stone, (*G. F. Grimes* with him,) for the defendant.

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MINNIE E. SPEAR *vs.* CHESTER F. HARDON & trustee.

Suffolk. March 11, 1913. — May 24, 1913.

Present: RUGG, C. J., HAMMOND, LORING, SHELDON, & DE COURCY, JJ.

Municipal Court of the City of Boston, Appellate Division. *Practice, Civil*, Appeal. *Contract*, In writing. *Evidence*, Extrinsic affecting writings. *Landlord and Tenant.*

On an appeal to this court from a decision of the Appellate Division of the Municipal Court of the City of Boston under St. 1912, c. 649, §§ 8, 9, the decision appealed from should be set forth in the form in which it was entered.

On an appeal to this court from a decision of the Appellate Division of the Municipal Court of the City of Boston under St. 1912, c. 649, §§ 8, 9, if there was an opinion stating the reasons for the decision, this should not be printed, not being a part of the record.

On an appeal to this court from a decision of the Appellate Division of the Municipal Court of the City of Boston under St. 1912, c. 649, §§ 8, 9, where no question of practice is raised, only the report to the Appellate Division, the decision thereon and the appeal to this court, with the dates of filing and an attestation by the clerk, need be printed. When a question of practice is raised, enough of the record of the Municipal Court should be printed to show clearly the point presented.

In an action of contract upon a covenant in a lease in writing to recover rent for an apartment at the rate of $45 a month in accordance with the terms of the lease, the defendant cannot be allowed to show that when the lease was made the plaintiff proposed to let the premises to the defendant in their existing condition for $42 a month, and then orally agreed to build a veranda in consideration of the rent being made $45 a month as inserted in the lease, and that the plaintiff did not build the veranda.

CONTRACT on a covenant to pay rent contained in a lease in writing under seal dated September 1, 1911, to recover the amount of $90, being two months' rent at the rate of $45 a month. Writ in the Municipal Court of the City of Boston dated September 5, 1912.

The answer alleged that, if the defendant signed the lease, he signed it in consideration of the plaintiff's oral agreement to build a covered veranda connecting with the leased apartment and to further adapt the apartment for the special use of the defendant's wife, who was an invalid, that the plaintiff failed to perform this agreement and that in consequence the defendant was obliged to remove from the premises.

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In the municipal court the case was tried before *Bolster*, C. J. The judge excluded the evidence offered by the defendant in support of this part of the answer, as stated in the opinion, and found for the plaintiff. At the request of the defendant he reported the case under St. 1912, c. 649, § 8, for determination by the Appellate Division. The following statement without signature or certificate was printed in the record of appeal presented to this court:

"(Memo.) Within two days after notice of the ruling complained of, the defendant filed his request that the case be reported to the Appellate Division for determination.

"Subsequently on December 12, 1912, the report as hereinbefore set forth was filed, and allowed by the presiding justice.

"Subsequently the case was argued before the Appellate Division, and later an order dismissing the report was filed by the justices comprising said Appellate Division."

The defendant appealed "from the opinion and order of the Appellate Division of said court in the above entitled matter."

G. H. Elwell, for the defendant.

C. T. Cottrell & A. Garceau, for the plaintiff, submitted a brief.

RUGG, C. J. This is an appeal from a decision of the Appellate Division of the Municipal Court of the City of Boston under St. 1912, c. 649.

A word needs to be said as to the form in which the case comes before us. There is in the record an unsigned recital entitled "(Memo.)" setting out the history of the case and the action of the Appellate Division. There is no judgment signed by the judges nor indorsement by the clerk that it is by order of the court. The decision of the Appellate Division should be set forth in the form in which it is entered. Under the statute that court "may reverse, vacate or modify" the ruling complained of "or order a new trial in whole or part" or "dismiss the report." The practice of other courts indicates as the procedure an order by the court for the entry of the decision, attested by the clerk, or instead the decision may be signed by the judges and filed. As is pointed out in *Cohen* v. *Berkowitz*, *ante*, 68, an opinion (if one is written), which is a statement of the reasons for the decision, is no part of the record, and should not be printed. When no question of practice is raised, only the report, the deci-

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sion of the Appellate Division and the appeal to this court, need be printed, showing the dates of filing or allowance of each, with an attestation by the clerk. If any question of practice is raised, enough of the record of the Municipal Court should be printed to show clearly the point presented.

This is an action of contract to recover instalments of rent due under a written lease. The defendant and the plaintiff executed the lease, and the defendant entered into possession of the premises, but left before the expiration of the term. The defendant offered to prove that, before the execution of the lease, the plaintiff proposed to let the premises described in the lease "as they then stood for the monthly rental of $42; but for the monthly rental of $45, the consideration named in said lease, she then agreed to build a covered veranda," and had not done so. The question of law presented is, whether this evidence was excluded rightly. This precise point was decided adversely to the contention of the defendant in *Brigham* v. *Rogers*, 17 Mass. 571, where it was held that an oral agreement that there should be a sufficiency of good water upon the demised premises, made before the execution of a written lease, was merged in the bargain which the parties later reduced to writing. The distinction was pointed out between an independent agreement and one which was a part of the agreement subsequently put in the form of a lease. This decision was approved in *Durkin* v. *Cobleigh*, 156 Mass. 108, 110. *Graffam* v. *Pierce*, 143 Mass. 386, on which the defendant relies, there was cited and distinguished. It is not always easy to decide on the facts arising in different cases between an independent agreement, for breach of which an action will lie, and one which is a part of that embodied in the written contract, and hence not admissible in evidence. The case at bar is not open to serious doubt, and is governed by the cases cited. See also *Edison Electric Illuminating Co.* v. *Gibby Foundry Co.* 194 Mass. 258. When such an independent agreement may be shown, a breach of it is not available as a defense at law or in equity, but as the foundation for a separate or cross action.

Judgment affirmed.

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WILLIAM B. MOFFATT vs. MAYOR OF LOWELL.

Middlesex. March 13, 1913. — May 24, 1913.

Present: RUGG, C. J., HAMMOND, LORING, SHELDON, & DE COURCY, JJ.

Police, Pension. *Pension. Civil Service.*

Under St. 1909, c. 188, providing that, in cities other than Boston which accept the provisions of the act, "any member of the police department," whose mental or physical condition or length of faithful service fulfils the requirements of the act, may be retired "at his own request, or at the request of the chief or superintendent of police" and thereafter shall receive a pension, a superintendent of police lawfully may be retired and pensioned.

In St. 1909, c. 188, providing for the retirement and pensioning of members of the police department in cities other than Boston which accept the provisions of the act, there is nothing which confines the giving of pensions to those who have been appointed under the civil service rules.

The provision of § 3 of St. 1903, c. 428, that members of the police department who are retired and pensioned under the provisions of that act in case of an emergency may be called upon for such temporary service in the department as they may be fitted to perform and during such service shall be entitled to full pay, does not require a person so retired to reside constantly in the city that pays him such a pension during the time that he is receiving it, and he does not lose his right to receive the pension by being absent from the Commonwealth during one half of each year, if he keeps the police department informed of his whereabouts and is ready at any time to return and perform temporary service whenever it may be required of him.

There is nothing in § 3 of St. 1903, c. 428, that requires a member of the police department of a city, who has been retired and pensioned under that statute as amended by St. 1909, c. 188, to keep the mayor of the city informed of his whereabouts during absences from the city, even assuming that under the charter of the city the mayor is the head of the police department; and consequently, upon a petition for a writ of mandamus to compel the mayor of a city to issue a warrant for the payment of such a pension, it is not necessarily decisive against the petitioner that he failed to notify the mayor of his whereabouts during such absences.

PETITION, filed on November 25, 1912, for a writ of mandamus directed to the mayor of the city of Lowell, commanding him to execute and deliver to the city treasurer a warrant for the amount of pension alleged to be due to the petitioner as a member of the police department retired from active service and placed on the pension roll under the provisions of St. 1903, c. 428, as amended by St. 1909, c. 188.

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The case was heard by *Morton*, J. The material facts are stated in the opinion. The justice ruled that the petitioner did not cease to be a member of the police department when he became superintendent of police; that the statute does not provide that the pension should be dependent in whole or in part on the petitioner's remaining in Lowell or in this Commonwealth, so as to be subject to the call of the mayor or of the board of police for such temporary service as he might be fitted to perform; and that the petitioner was entitled to a writ of mandamus as prayed for. He ordered that a peremptory writ should issue, and, at the defendant's request and with consent of the plaintiff, reported the case for determination by the full court.

J. R. Benton, (*M. M. Johnson* with him,) for the petitioner.

J. J. Hennessy, for the respondent, submitted a brief.

RUGG, C. J. This is a petition for a writ of mandamus to compel the mayor of Lowell to issue a warrant for the payment of a pension alleged to be due to the petitioner. The material facts are that the petitioner had been a member of the police force of the city of Lowell in subordinate positions for more than twenty years when, in 1901, he was appointed superintendent of police. He held this office until 1909, when, upon his request to be retired and pensioned, the board of police passed an order granting the request in due form, with a recital that he had performed faithful service as a member of the department for more than twenty years continuously, and in their judgment was disabled from useful service in the department. St. 1903, c. 428, and acts amendatory thereto had been accepted by Lowell. The pension was paid until December 31, 1911. The petitioner each year since his retirement has been absent from the Commonwealth about six months, and has kept the superintendent of police, the messenger of the police department and the city treasurer notified of his whereabouts, and was and is at all times ready to return to Lowell and perform active service if required, but at no time has he so notified the respondent, as mayor.

1. The respondent contends that the law does not provide for the retirement on a pension of the superintendent of police. The material words of the statute (St. 1909, c. 188, amending

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St. 1903, c. 428) are printed in a footnote.* It seems plain that on general principles the head of the department of police is a member of that department. The general in chief of an army and the admiral of a navy are members respectively of these branches of the service. A superintendent of police must be clothed with the ordinary powers of a police officer to make arrests and perform other duties of a police officer. It would require clear words of the statute to exclude him from being considered a member for pension purposes. The language of the statute is that "any member of the police department" may be retired "at his own request, or at the request of the . . . superintendent of police." The power conferred upon the superintendent to request the retirement of any other member of the department does not show that he is excluded from the general provision that any member may make such request. See *Devery* v. *Coler*, 173 N. Y. 103. The statute does not manifest any intention to confine pensions to those who have been appointed under the civil service rules. The circumstance that the petitioner may not have been so appointed is immaterial. See *Barnes* v. *Mayor of Chicopee*, 213 Mass. 1.

2. The petitioner was not required to reside constantly in Lowell while receiving the pension. The statute does not exact this expressly, but the respondent argues that it does so impliedly by § 3 of St. 1903, c. 428, authorizing the board of police or the

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*"The mayor and aldermen, or the board of police of any city where such boards are established, except Boston, which, by vote of its city council accepts the provisions of this act, shall, at his own request, or at the request of the chief or superintendent of police, if, in the judgment of said board, he is disabled for useful service in said department, retire from active service and place upon a pension roll any member of the police department of such city whom the city physician of such city certifies in writing to be permanently disabled, mentally or physically, by injuries sustained through no fault of his in the actual performance of duty, from further performing duty as such member, or any member of said department who has performed faithful service therein for not less than twenty years continuously, if, in the judgment of said board, such member is disabled for useful service in the department, and every member so retired shall annually receive as a pension one half the amount of compensation received by him at the time of his retirement, such amount to be paid by the city, which shall appropriate money therefor."

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mayor in cities having no board of police, "in case of an emergency, to call upon any person so pensioned for such temporary service in the department as he may be fitted to perform, and during such service he shall be entitled to full pay." It was within the power of the Legislature to make the payment of a pension dependent upon any conditions. If it had been its purpose to make continuous residence in the city paying the pension a condition of receiving it, the expression of such an intent would have been simple. There is no physical incompatibility between a residence outside the Commonwealth and a response by the pensioner to temporary emergency service. That the petitioner's absence from the Commonwealth during one half of each year cannot be said upon the record to have been inconsistent with a response upon his part to an emergency summons is apparent from the agreed fact that he kept the police department informed of his whereabouts and was at any time ready to return and perform active temporary service if it was required of him. A pension is a reward given for conspicuous or long continued faithful public service rendered in the past. It is not compensation for labor performed concurrently with its payment. There is, therefore, no inherent necessity that one receiving the pension be a resident within the territory of the pensioning power.

3. There is nothing in the statute which requires the petitioner to keep the respondent informed of his whereabouts. If it be assumed that the mayor of the city is the head of the police department under St. 1911, c. 645,* in view of all the facts, this circumstance of failure to notify the mayor is not decisive against the petitioner.

Writ to issue.

* The amended charter of the city of Lowell.

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BARNEY GILLEN'S CASE.

Suffolk. March 14, 1913. — May 24, 1913.

Present: RUGG, C. J., HAMMOND, LORING, SHELDON, & DE COURCY, JJ.

Workmen's Compensation Act. Words, "Average weekly wages."

Under the workmen's compensation act a longshoreman, who was engaged in continuous labor in regular employment with different employers and was injured in the course of his employment with one of them, is entitled to receive, during his total incapacity for work resulting from such injury, a compensation equal to one half the "average weekly wages" earned by him in all of such regular employment and not merely one half of the wages paid to him by the employer in whose service he was injured.

APPEAL to the Superior Court under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, from a decision of the Industrial Accident Board.

The case was heard by *Pierce*, J. The facts are stated in the opinion. The judge made a decree that the findings of fact of the Industrial Accident Board be approved and that in accordance therewith the employee, Barney Gillen, should receive a weekly payment of $6.50 each week during his total incapacity for work. The insurer, the Ocean Accident and Guarantee Corporation, Limited, appealed.

St. 1911, c. 751, Part II, § 9, provides as follows: "While the incapacity for work resulting from the injury is total, the association shall pay the injured employee a weekly compensation equal to one half his average weekly wages, but not more than ten dollars nor less than four dollars a week; . . ."

Other material portions of the statute are quoted or described in the opinion.

J. T. Connolly, for the insurer.

J. E. McConnell, for the employee.

RUGG, C. J. This is an appeal under the workmen's compensation act. St. 1911, c. 751. The employee, a longshoreman, was injured in the course of his employment by the Canada, Atlantic and Plant Steamship Company, which was insured under the

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act with the insurer. The facts are that the steamship company operates a line between Boston and Halifax, one boat in winter and two boats in summer, arriving at and leaving Boston each week. The longshoremen in its employ work on an average for fifteen to twenty hours weekly, and receive from it not more than $8 a week. The employee, like other longshoremen, worked for other employers during a day or group of days, and earned by the year by his services an average weekly wage of $13, which was the average weekly wage earned by other longshoremen in the same class of employment in the same district. The insurer contends that the employee was not a regular employee of the steamship company, and that his average weekly wages must be the average amount per week which during the twelve months previous to the injury was being earned by a person in the same grade, employed at the same work by the same employer. If this contention is sound, the employee would be entitled to $4 per week. The employee contends, however, that, inasmuch as he worked continuously at his occupation as longshoreman for different employers according to the custom of his craft, he is entitled to receive $6.50, being one half his average weekly earnings as longshoreman from all sources.

The decision depends upon the meaning of "average weekly wages" and the method of their ascertainment as set out in Part V, § 2 of the act. "Average weekly wages" are there defined to mean "earnings of the injured employee during the period of twelve calendar months immediately preceding the date of injury, divided by fifty-two; but if the injured employee lost more than two weeks' time during such period then the earnings for the remainder of such twelve calendar months shall be divided by the number of weeks remaining after the time so lost has been deducted." It is apparent both from its phrase and its context that this sentence applies to a continuous employment throughout the year. While the language is not amplified, it refers to substantially uninterrupted work in a particular employment from which the wages of the employee are derived. The basis is the earning capacity of the workman as shown by such employment. The next clause of the section is, "Where, by reason of the shortness of the time during which the employee has been in the employment of his employer, or the

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nature or terms of the employment, it is impracticable to compute the average weekly wages, as above defined, regard may be had to the average weekly amount which, during the twelve months previous to the injury, was being earned by a person in the same grade employed at the same work by the same employer." This clause provides a method for the determination of average weekly wages where the employee for the reasons stated has not been in the service for a year, by reference to the wages of others whose employment is substantially continuous. It affords a guide by which to estimate the compensation to be paid to the employee where there are those in the service of the same employer continuously employed in the same grade at the same kind of work. It is apparent that this clause does not cover the employee's case, because there is no substantially continuous employment of longshoremen by this steamship company during the year. It is obvious from the broad scope of the act and its comprehensive dealing with the whole subject that it was intended to provide for the employee as compensation within the limits specified therein a definite proportion of the amount which he earned weekly. It cannot be presumed that the Legislature intended to offer a scheme of accident insurance which would be illusory or barren to large numbers of workmen. "Weekly wages" as used in the first sentence quoted above plainly means all the wages which the employee received in the course of a permanent employment, which are all the wages he receives. Where words are used in one part of a statute in a definite sense it may be presumed, in the absence of a plain intent to the contrary, that they are used in the same sense in other places in the same act. Therefore, we reach the conclusion that average weekly wages as used in the clause of the act last quoted was not intended to apply to recurrent periods of brief service at regular intervals, in cases where the entire time of the workmen is devoted to like employment for other employers in the same general kind of business. The final clause of the paragraph defining average weekly wages is as follows: "or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district." This clause affords reference to a general average of like employment in the neighborhood as a standard to be considered. It does not restrict consideration

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of the matter to the same employer. It applies to a case like the present, where the custom of the employment is for continuous work of a specified kind for different employers.

While the language of the definition is not so clear as might be desired, it seems to us to be intended to include in abridged form parts of (1) (b) and (2) (a) and (b) of the first schedule of the English workmen's compensation act, 6 Edw. VII (1906), c. 58. It is true that (2) (b) of the English schedule covers a case like the present in express language. But the English act is more minute in many of its provisions, and our act resembles the present English act far more closely than it does the earlier one of St. 60 & 61 Vict. c. 37. Although not stated in precise words, we think that the general import of the act is to base the remuneration to be paid upon the normal return received by workmen for the grade of work in which the particular workman may be classified. This is a case where it is "impracticable" to reach a result which shall be fair to the workman to the extent intended by the act of giving him compensation for average weekly earnings in any other way than by following the course pointed out in the final clause of the definition. See *Perry* v. *Wright*, [1908] 1 K. B. 441; *Anslow* v. *Cannock, Chase Colliery Co.* [1909] 1 K. B. 352; *S. C.* [1909] A. C. 435.

This is not a case where the usual employment of the employee is only two or three days in a week as pointed out in *White* v. *Wiseman*, [1912] 3 K. B. 352, 359, but a case where the condition of the workman is continuous labor in regular employment with different employers. The loss of his capacity to earn, as demonstrated by his conduct in such regular employment, is the basis upon which his compensation should be based.

Decree affirmed.

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C. A. BRIGGS COMPANY *vs.* NATIONAL WAFER COMPANY.

Suffolk. March 17, 1913. — May 24, 1913.

Present: RUGG, C. J., MORTON, LORING, SHELDON, & DE COURCY, JJ.

Unfair Competition. Trademark. Trade Name. Equity Jurisdiction, To restrain unfair competition, Accounting for profits. *Equity Pleading and Practice,* Master's report, Decree, Costs. *Res Judicata. Words,* "Boston," "Wafers."

It here was assumed as practically conceded, that the words "Boston Wafers," used to designate an article of manufacture and trade, were merely descriptive and could not be made a valid trademark.

A merely descriptive epithet, which is incapable of becoming a valid trademark, by long and exclusive use in trade may become so associated with a particular class of goods or with the specific product of a particular manufacturer, that the attaching of the epithet to a similar product by a competing manufacturer or seller will have all the effect of a falsehood, unless accompanied by sufficient explanations or precautions to prevent confusion with the goods of the original manufacturer, and, when likely to deceive purchasers, such use of the name may be restrained in equity as unfair competition.

A manufacturer, who by long and exclusive use of a trade name, consisting of words incapable of becoming a valid trademark, has created for that name within a certain territory a secondary meaning which entitles him to protection against unfair competition in its use, is not entitled to restrain the use of such trade name outside the territory within which he has established the meaning on which his rights depend.

Although a master's report in a suit in equity may be modified or reversed or recommitted to the master if any error appears to have been made or if any good reason for such action is shown, yet, unless one of these things is done by the trial judge, the report has the effect that a verdict or the special findings of a jury have in an action at law, and it will be presumed, where the contrary does not appear by the record, that the facts have been found correctly, that proper principles of law have been followed and that all matters have been dealt with rightly.

In a suit in equity the confirmation of a master's report by a final decree makes all findings of fact contained in that report conclusive between the parties to the suit, and these matters are none the less *res judicata* if such final decree was entered by the consent of the parties.

In a suit in equity to restrain unfair competition in the use of a trade name to which the plaintiff is alleged to have established an exclusive right, if the plaintiff seeks an accounting for profits derived from the unlawful use of the trade name, but otherwise demands no damages, and if the plaintiff shows that the defendant received substantial sums of money from sales of goods wrongfully bearing the plaintiff's label or an imitation of it, but it appears that the defendant's general expenses were incurred at least proportionally for such unlawful dealings and that after deducting the proportionate share of such

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expenses the unlawful dealings showed no profit, the plaintiff is entitled to nothing by way of profits.

In a suit in equity in which the plaintiff sought an injunction and an accounting for profits alleged to have been obtained by the wrongful acts of the defendant, and the plaintiff established his right to an injunction only as to a part of the acts of the defendant alleged to have been wrongful, and the defendant was shown to have derived no profits from such wrongful acts, costs were awarded to the plaintiff, although he had shown himself to be entitled only to a part of the relief prayed for in his bill, because a part of the defendant's conduct, which the defendant attempted to justify, had been that of a wrongdoer.

BILL IN EQUITY, filed in the Supreme Judicial Court on February 19, 1912, by a corporation organized under the laws of the State of Maine against another corporation organized in the same State, to restrain the defendant from manufacturing or selling any rolls or packages of wafers as or for "Boston Wafers," or from selling any wafers in rolls or packages enclosed in wrappers made in imitation of those used by the plaintiff, for an accounting for profits wrongfully derived by the defendant from a violation of the alleged rights of the plaintiff, and for damages. The bill alleged that by a decree made on August 10, 1911, in a suit in equity in the same court between the same parties, the defendant was enjoined from using the name "Boston Wafers" in New England, in the States of New York, New Jersey, Pennsylvania and Maryland and in the District of Columbia, and the present bill was brought to extend the prohibition to sales outside the territory covered by that decree.

The case was referred to Walter F. Frederick, Esquire, as master. In the previous suit between the same parties the master was John Duff, Esquire, and the decree, which was consented to by the counsel on both sides, was made by *Sheldon*, J.

The following exceptions of the defendant to the master's report in the present case are referred to in the opinion.

"4. To the ruling of the master admitting in evidence against the objection of the defendant those portions of the master's report in the former case which relate to the acts of the defendant in the New England States, the States of New York, New Jersey, Pennsylvania, Maryland and the District of Columbia."

"6. To the findings of the master Nos. 1 to 77 inclusive on the ground that said findings are based exclusively on the report of the said master in the said former case."

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"29. To the ruling of the master in finding No. 174 that 'the accounting should include the profits on all sales of the infringing goods wherever made except as limited by the terms of the said agreement' of August 10, 1911. . . .

"30. To the refusal of the master to find, as requested by the defendant, that the fair presumption is that in the States of Alabama, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, North Carolina, North Dakota, South Dakota, South Carolina, Tennessee, and Wisconsin, where there was no competition between the plaintiff and the defendant in the sales of 'Boston Wafers,' the defendant's 'Boston Wafers' were not palmed off on purchasers as the goods of the plaintiff.

"31. To the refusal of the master to find, as requested by the defendant, that the fair presumption is that in the territory where the plaintiff's 'Boston Wafers' have not acquired a secondary meaning, the 'Boston Wafers' of the defendant were not palmed off on purchasers as the goods of the plaintiff.

"32. To the refusal of the master to find, as requested by the defendant, that the fair presumption is that in the States of Washington, Iowa, North Carolina, Missouri, Georgia, Tennessee, Minnesota, Kansas, Nebraska, Kentucky, Montana, Alabama, Louisiana, Mississippi, North Dakota and South Dakota, in which the defendant's 'Boston Wafers' were introduced before the plaintiff's 'Boston Wafers,' the defendant's 'Boston Wafers' were not palmed off on purchasers as the 'Boston Wafers' of the plaintiff.

"33. To the refusal of the master to find, as requested by the defendant, that the fair presumption is that the defendant's wafers wrapped in wrappers bearing the name 'Nawaco Boston Wafers' and used in the outside territory, were not palmed off on purchasers as the 'Boston Wafers' of the plaintiff."

The case came on to be heard by *De Courcy*, J., who at the request of the parties reserved it upon the pleadings, the master's report and the exceptions thereto for determination by the full court.

P. W. Carver, (*A. G. Carver & O. C. Scales* with him,) for the plaintiff.

W. K. Richardson, (*J. L. Stackpole* with him,) for the defendant.

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SHELDON, J. The principal question in this case is whether the plaintiff has the right to restrain the defendant from using, outside of the territory which was specified in the decree made by a justice of this court in the former suit, the words "Boston Wafers" as the name of the articles which it manufactures and sells in competition with the plaintiff. The answer to this question depends upon well settled principles.

It practically has been conceded in argument that the plaintiff has no exclusive right to the use of these words in connection with its product as a trademark strictly so called. This is correct. The word "Boston" is merely a territorial or geographical designation; the word "wafers" is nothing more than the ordinary name given to the article of confectionery made by each of these parties. Neither alone nor together could either one of these words be adopted as a trademark. This is on the broad principle stated by the Supreme Court of the United States in *Standard Paint Co.* v. *Trinidad Asphalt Manuf. Co.* 220 U. S. 446, that no sign or form of words can be appropriated as a valid trademark which according to its primary meaning may with equal truth and equal right be employed by others for the same purpose. *Canal Co.* v. *Clark*, 13 Wall. 311. *Brown Chemical Co.* v. *Meyer*, 139 U. S. 540. *Columbia Mill Co.* v. *Alcorn*, 150 U. S. 460, 463. *Kann* v. *Diamond Steel Co.* 89 Fed. Rep. 706. *Postum Cereal Co.* v. *American Health Food Co.* 119 Fed. Rep. 848, 852. *American Wine Co.* v. *Kohlman*, 158 Fed. Rep. 830. *Cellular Clothing Co.* v. *Maxton*, [1899] A. C. 326. *S. Chivers & Sons* v. *S. Chivers & Co.* 17 R. P. C. 420.

But it is also true that a merely descriptive epithet or the name of a person or of a place may become so associated with a particular kind of goods, or with the specific product of a particular manufacturer, that the mere attaching of that word to a similar product without more would have all the effect of a falsehood; and in such a case, while the use of that word cannot be absolutely prohibited, it may be restrained unless accompanied by sufficient explanations or precautions to prevent confusion with the goods of the original manufacturer or vendor. *American Waltham Watch Co.* v. *United States Watch Co.* 173 Mass. 85. *Viano* v. *Baccigalupo*, 183 Mass. 160. *Cohen* v. *Nagle*, 190 Mass. 4, 8, 14. *Elgin National Watch Co.* v. *Illinois Watch*

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Case Co. 179 U. S. 665, 674. *Herring-Hall-Marvin Safe Co.* v. *Hall's Safe Co.* 208 U. S. 554, affirming with modification *Hall's Safe Co.* v. *Herring-Hall-Marvin Safe Co.* 146 Fed. Rep. 37. *Bauer & Co.* v. *Distillerie de la Liqueur Bénédictine,* 120 Fed. Rep. 74. *Shaver* v. *Heller & Merz Co.* 108 Fed. Rep. 821. *Royal Baking Powder Co.* v. *Royal,* 122 Fed. Rep. 337. *Wolf Bros. & Co.* v. *Hamilton-Brown Shoe Co.* 165 Fed. Rep. 413. *Wotherspoon* v. *Currie,* L. R. 5 H. L. 508. *Montgomery* v. *Thompson,* [1891] A. C. 217. Even though a word or a combination of words is incapable of becoming a valid trademark, yet if it has by a sufficiently long and exclusive use acquired such a secondary meaning as to indicate in the trade that the goods to which it is applied are made by a particular manufacturer or are put upon the market by a particular vendor, its use by another upon similar goods in such a way as to be likely to deceive purchasers will be restrained as unfair competition; and its use even in its primary meaning will be so limited as to prevent the working of a probable deception by passing off the goods of one maker as those of another. *New England Awl & Needle Co.* v. *Marlborough Awl & Needle Co.* 168 Mass. 154. *W. R. Lynn Shoe Co.* v. *Auburn-Lynn Shoe Co.* 100 Maine, 461. *Drake Medicine Co.* v. *Glessner,* 68 Ohio St. 337. *Sartor* v. *Schaden,* 125 Iowa, 696. *Dyment* v. *Lewis,* 144 Iowa, 509. *People* v. *Rose,* 219 Ill. 46. *Northwestern Knitting Co.* v. *Garon,* 112 Minn. 321. *Lawrence Manuf. Co.* v. *Tennessee Manuf. Co.* 138 U. S. 537. *American Waltham Watch Co.* v. *Sandman,* 96 Fed. Rep. 330. *Computing Scale Co.* v. *Standard Computing Scale Co.* 118 Fed. Rep. 965, 967. *Siegert* v. *Gandolfi,* 149 Fed. Rep. 100. *Lowe Bros. Co.* v. *Toledo Varnish Co.* 168 Fed. Rep. 627. *R. Guastavino Co.* v. *Comerma,* 184 Fed. Rep. 549. *Gillett* v. *Lumsden Brothers,* 4 Ont. L. R. 300. *Lee* v. *Haley,* L. R. 5 Ch. 155. *Powell* v. *Birmingham Vinegar Brewery Co.* [1896] 2 Ch. 54 and [1897] App. Cas. 710.

The master has found that in some of the States of the "outside territory," that is, the States not covered by the decree in the former case, the words "Boston Wafers" had when this bill was filed acquired such a secondary meaning in the trade as to indicate that the wafers to which these words were applied were the product of the plaintiff, manufactured and sold by it; that this

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was the case in Ohio, Michigan, Virginia and portions of West Virginia; but he has not found that in the other States included in the "outside territory" the plaintiff has by its use of these words gained for them the secondary meaning which has been stated. The defendant has applied these words to its own goods in the States which have been mentioned as well as elsewhere, with the intention of diverting to itself the trade of the plaintiff; that is, as we feel bound to interpret the language of the report, with the intention of availing itself of the reputation of the plaintiff's goods and procuring sales of its own goods to purchasers either at wholesale or at retail, who may be led to believe that they are buying goods made by the plaintiff. Under these circumstances, the plaintiff contends that this constitutes unfair competition, against which it is entitled to be protected in the whole of the United States.

In *Cohen* v. *Nagle*, 190 Mass. 4, it appeared that the plaintiff manufactured and sold cigars under the name "Keystone," and that, although this word did not constitute a trademark, it had come to be understood in New England to indicate cigars made by the plaintiff. It was held that he had a right to be protected, at least in New England, against the acts of the defendants, who were applying that name to cigars of their own make. A final decree was entered in the case, enjoining the defendants from using that word in the New England States; and only the defendant appealed from that decree. The decree was affirmed; and it was said in the opinion of the majority of the court that as the plaintiff had not appealed from the decree, it was not open to the defendants to complain that the decree was too narrow and that it should have been made without geographical limitations. But three of the justices considered that as it had not been shown that the secondary or acquired meaning of the word "Keystone" extended beyond New England, the injunction rightly was confined to that territory. That is, three of the justices were strongly of the opinion that one who uses a name, not strictly a trademark, and who has procured for that name a secondary meaning which entitles him to protection against unfair competition in its use, is entitled to such protection only within the territorial boundaries beyond which he has not succeeded in extending the meaning upon which his rights depend; and four justices did not find it

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necessary to express any opinion upon the subject. That question now must be decided.

We do not doubt that the plaintiff is entitled to relief within the four States which have been mentioned, unless some of the specific objections which have been made by the defendant are to be sustained. The point is settled in favor of the plaintiff by *Cohen* v. *Nagle, ubi supra.* The case, as to these four States, comes within the general doctrine applicable alike to trademarks and to cases of this kind, that one has a right to be protected in selling his goods against the unfair competition of any others who may seek by imitating his brands or the style of his packages to palm off their goods as his. *Hildreth* v. *D. S. McDonald Co.* 164 Mass. 16. *George G. Fox Co.* v. *Glynn,* 191 Mass. 344. *George G. Fox Co.* v. *Hathaway,* 199 Mass. 99. *Reading Stove Works* v. *S. M. Howes Co.* 201 Mass. 437. *Forster Manuf. Co.* v. *Cutter-Tower Co.* 211 Mass. 219. *Taendsticksfabriks Aktiebolagat Vulcan* v. *Meyers,* 139 N. Y. 364. *Gorham Co.* v. *White,* 14 Wall. 511. *McLean* v. *Fleming,* 96 U. S. 245. *American Tin Plate Co.* v. *Licking Roller Mill Co.* 158 Fed. Rep. 690 and 830. *Holeproof Hosiery Co.* v. *Wallach Bros.* 190 Fed. Rep. 606. *Coca Cola Co.* v. *Gay-Ola Co.* 200 Fed. Rep. 720. *Notaseme Hosiery Co.* v. *Straus,* 201 Fed. Rep. 99. *Saxlehner* v. *Apollinaris Co.* [1897] 1 Ch. 893.

As a matter of sound reasoning, it seems difficult to extend the rights of the plaintiff beyond the ground on which those rights are rested. Its whole case depends upon the fact that the words "Boston Wafers" have acquired in the trade a secondary meaning by which they signify not merely or necessarily that the goods were made in Boston (*Wotherspoon* v. *Currie,* 42 L. J. (N. S.) Ch. 130, and L. R. 5 H. L. 508), but that they were made by the plaintiff. Where the words have not gained that meaning, no rights of the plaintiff are infringed by the defendant's use of them. The defendant has the right to imitate the labels and wrappers of the plaintiff where this involves no infringement of a trademark and no attempt to get the benefit of the public's desire to have goods made by the plaintiff. *Flagg Manuf. Co.* v. *Holway,* 178 Mass. 83. Where the secondary meaning of the words was unknown, no purchaser could have understood them in any but their primary sense, and no purchaser could have been deceived

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by their use. *Columbia Mill Co.* v. *Alcorn*, 150 U. S. 460, 463. *Parsons* v. *Gillespie*, [1898] A. C. 239. The gist of the action is not the harmless use of the particular words and symbols, but the appropriation of the plaintiff's business. *Rains & Sons* v. *White, Haucke & Co.* 107 Ky. 114. *Banzhaf* v. *Chase*, 150 Cal. 180. And see *Clark Thread Co.* v. *William Clark Co.* 11 Dick. 789; *Baker* v. *Baker*, 115 Fed. Rep. 297; *J. F. Rowley Co.* v. *Rowley*, 193 Fed. Rep. 390, 393. See also the reasoning of Loring, J., in *Cohen* v. *Nagle*, 190 Mass. 4, 16, *et seq.*

In *Carroll* v. *McIlvaine*, 171 Fed. Rep. 125, and (on appeal) 183 Fed. Rep. 22, the protection given to a plaintiff against unfair competition was confined to the territorial limits within which he had carried on his business and gained his rights. So in *Cellular Clothing Co.* v. *Maxton*, [1899] A. C. 326, the court refused to enjoin the use of the words "cellular clothing" in Scotland, because there the words had only their primary signification. To the same effect see *S. Chivers & Sons* v. *S. Chivers & Co.* 17 R. P. C. 420. The same rule was applied between different parts of the same State in *Eastern Outfitting Co.* v. *Manheim*, 59 Wash. 428. So too in *Sartor* v. *Schaden*, 125 Iowa, 696, 704, and *Corwin* v. *Daly*, 7 Bosw. 222. In *Orr Ewing & Co.* v. *Johnston & Co.* 13 Ch. D. 434, the injunction against the defendant was made general, although the plaintiff had sold his goods only in the Indian market; but that was a case of the infringement of a trademark and not of unfair competition merely, and the decision is not applicable here. In *Northwestern Knitting Co.* v. *Garon*, 112 Minn. 321, the plaintiff's business and its consequent right of protection had extended throughout the United States.

We are satisfied that the plaintiff is entitled to relief only against the making of sales under its brand in the States of Ohio, Michigan, Virginia and West Virginia.

As to the wrappers, we are of opinion upon the facts found by the master that the rights of the plaintiff will be sufficiently guarded if the defendant is enjoined from using in the States last mentioned the words "Boston Wafers," or other words or symbols of like effect, in substantially the same language that was used in the final decree entered in the former suit.

It remains to consider the exceptions to the master's report

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and the specific questions thereon which have been argued before us.

The record of the former suit rightly was admitted in evidence. The case had been fully heard by the master, and he had made a comprehensive report in which he had stated his findings upon all the questions of fact that were raised before him. This report stood practically upon the same footing as that upon which the verdict or the special findings of a jury would have stood. It might have been modified or reversed in part or recommitted to the master if any error appeared to have been made, or if any good reason for such action had been shown. But in the meantime the presumption existed that the facts had been correctly found, that proper principles of law had been followed and that all matters had been rightly dealt with. It is enough to cite a few of the many cases which have affirmed this principle. *Pratt* v. *Lamson*, 6 Allen, 457. *Trow* v. *Berry*, 113 Mass. 139. *Jones* v. *Keen*, 115 Mass. 170, 181, 182. *Morrell* v. *Kelley*, 157 Mass. 126. *Kennedy* v. *Welch*, 196 Mass. 592. *Atherton* v. *Emerson*, 199 Mass. 199, 208. *Attorney General* v. *Vineyard Grove Co.* 211 Mass. 596. *Stewart* v. *Hanreddy*, 212 Mass. 340. It was said in *Kyle* v. *Reynolds*, 211 Mass. 110, that the findings of the master "had the weight and effect of a verdict by a jury and could be set aside only for clear error and mistake on his part."

No fault however was found in the former case with the report; but a decree was entered thereon expressly confirming the report and granting relief in accordance with its findings. This was a final decree, and whatever had been in issue between the parties became *res judicata*. *Stone* v. *St. Louis Stamping Co.* 155 Mass. 267. *Corbett* v. *Craven*, 193 Mass. 30. *Pray* v. *Hegeman*, 98 N. Y. 351, 358. *People* v. *Rickert*, 159 Ill. 496. *Bodkin* v. *Arnold*, 45 W. Va. 90. *Smith* v. *Clark*, 26 L. R. A. (N. S.) 953, 960. *Washington, Alexandria, & Georgetown Steam-Packet Co.* v. *Sickles*, 24 How. 333. *Campbell* v. *Rankin*, 99 U. S. 261, 263. *Green* v. *Bogue*, 158 U. S. 478. *Empire State Nail Co.* v. *American Solid Leather Button Co.* 74 Fed. Rep. 864. *G. & C. Merriam Co.* v. *Saalfield*, 190 Fed. Rep. 927. The confirmation of the master's report by the decree made the findings of fact contained in that report conclusive between the parties. *Nash* v. *Hunt*, 116 Mass. 237, 249. *Chicago Lumber Co.* v. *Bancroft*, 57 L. R. A.

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910. Nor is it material that this final decree was entered by the consent of the parties. The issues had been judicially considered by the master, and his report had been made to the court. It was like a judgment at law entered by consent of the parties after and upon the verdict of a jury, which, as we have seen, closely resembles the report of a master. Accordingly such cases as *B., C. R. & M. R. Co.* v. *County of Benton*, 56 Iowa, 89, and *Jenkins* v. *Robertson*, L. R. 1 H. L. (Sc.) 117, are not applicable here. The decree is not less conclusive because it was entered by consent. *Horton* v. *Baptist Church*, 34 Vt. 309. *Holmes* v. *Rogers*, 13 Cal. 191. *David Bradley Manuf. Co.* v. *Eagle Manuf. Co.* 57 Fed. Rep. 980. *Webb* v. *Webb*, 3 Swanst. 658. Indeed, but for the reservation contained in that decree, it well might have been contended that it was a bar to the present suit. *Whitman* v. *Boston & Maine Railroad*, 16 Gray, 530. *Foye* v. *Patch*, 132 Mass. 105. *Cromwell* v. *County of Sac*, 94 U. S. 351. *Last Chance Mining Co.* v. *Tyler Mining Co.* 157 U. S. 683. *Jaros Hygienic Underwear Co.* v. *Fleece Hygienic Underwear Co.* 65 Fed. Rep. 424.

After examining carefully the reported evidence and the report itself, we cannot say that any of the master's findings of fact are erroneous. So far as we perceive, the findings were well warranted, and we discover no reason to interfere with them. The evidence as to the earlier use of the name "Boston Wafers" by other parties, or as to the limited extent and character of its use by the plaintiff, was not such as to require the inference that those words had not acquired the secondary meaning claimed by the plaintiff. *Cohen* v. *Nagle*, 190 Mass. 4, 11. *Menendez* v. *Holt*, 128 U. S. 514. *Celluloid Manuf. Co.* v. *Cellonite Manuf. Co.* 32 Fed. Rep. 94. *Brower* v. *Boulton*, 58 Fed. Rep. 888. *Tetlow* v. *Tappan*, 85 Fed. Rep. 774. *Raymond* v. *Royal Baking-Powder Co.* 85 Fed. Rep. 231. *Eiseman* v. *Schiffer*, 157 Fed. Rep. 473. The master was not bound to find, if indeed he properly could have found, that the plaintiff had acquired any exclusive right to the use of the words "Boston Wafers" by reason of those words having come to mean goods made by the plaintiff, in the "outside territory" other than the four States which have been named. But he had a right to find, and we do not criticise his finding, that the words had acquired that secondary meaning in those four States.

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The plaintiff does not seek to recover any damages as such. It desires only an accounting for the profits which the defendant has realized from its wrongful sales.

It appears from the master's report that the defendant has made substantial profits from its sales of goods bearing the plaintiff's label or an imitation thereof, unless a deduction is made of a part of its general expenses to be determined by apportioning them in the ratio which its sales of Boston Wafers bear to its total sales. If such a deduction is made, the defendant has obtained no profits from the sales in question.

It has been held by the Supreme Court of the United States that such a deduction should be made in ascertaining the profits realized by the infringer of a patent. *The Tremolo Patent,* 23 Wall. 518. The same rule has been followed since that decision in trademark cases and cases of unfair competition, some of which are collected in *Regis* v. *H. A. Jaynes & Co.* 191 Mass. 245. In the last named case this court declined to follow the rule of *The Tremolo Patent, ubi supra,* deeming it inapplicable to the facts before the court. In the *Regis* case, the defendants were carrying on a large business, of which their dealings in goods bearing the plaintiff's trademark constituted only a small part, and the defendants' general expenses did not appear to have been at all increased by those dealings. Here the defendant's dealings in Boston Wafers have been a substantial and integral part of its entire wafer and lozenge business, averaging about ten per cent thereof; and its general expenses were incurred for this department and its increase and extension just as for any part of its business. The defendant has used considerable and cumulative effort to push and increase these sales, very probably more than it has applied to other parts of its business. While there is no direct evidence on the subject, it seems manifest to us, looking at the master's report, that the defendant's general expenses have been at least proportionately increased by this department. The rule adopted in *The Tremolo Patent, ubi supra,* is the general rule, to be applied where special circumstances do not make its application unjust. *Cutter* v. *Gudebrod Brothers Co.* 190 N. Y. 252. *Rubber Co.* v. *Goodyear,* 9 Wall. 788. *Winchester Repeating Arms Co.* v. *American Buckle & Cartridge Co.* 62 Fed. Rep. 278, 280. *Kissinger-Ison Co.* v. *Bradford Belting Co.* 123

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Fed. Rep. 91. *Walter Baker & Co.* v. *Slack,* 130 Fed. Rep. 514.

Nor can we say that the master's finding on this point was erroneous, although undoubtedly there were circumstances pointing in the other direction, and these have been made the most of in the argument for the plaintiff.

Our conclusion must be that on the whole case the plaintiff can recover nothing by way of profits.

The plaintiff has not contended that the evidence referred to in its fourth and sixth exceptions was erroneously admitted, if it was competent, as we think it was, for the defendant to prove the amount of its general expenses.

The result is that of the defendant's exceptions to the master's report the thirtieth, thirty-first, thirty-second, thirty-third and part of the twenty-ninth must be sustained. All the other exceptions of either party must be overruled. We do not understand the defendant to have made any claim that the State of West Virginia should not be treated as an integral whole. If that be so, the final decree will enjoin the defendant from selling or offering for sale in the States of Ohio, Michigan, Virginia and West Virginia any wafers of which the packages bear the name "Boston Wafers," etc., substantially in the language of the final decree entered in the former case between these parties.

Under the circumstances, we are of opinion that the plaintiff should be allowed its costs; for although it has maintained only a part of the claim made in its bill, yet the defendant has contested even this part, and as to this part its conduct has been that of a mere wrongdoer.

A final decree should be entered accordingly.

So ordered.

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HARRIS KENNEDY & another, executors & trustees, *vs.* FREDERICK HODGES & others.

Suffolk. March 17, 1913. — May 24, 1913.

Present: RUGG, C. J., MORTON, LORING, SHELDON, & DE COURCY, JJ.

Executor and Administrator. Corporation, Foreign: *situs* of shares.

An ancillary executor, appointed in this Commonwealth, of the will of a non-resident, which was proved in the State in which the testator had his domicil, should administer under R. L. c. 143, as estate of his testator "found here," the following classes of property: chattels in this Commonwealth, bank deposits in this Commonwealth, checks in this Commonwealth payable to the testator and drawn on banks in this Commonwealth, coupon bonds and registered bonds of foreign corporations in a safe deposit box in this Commonwealth, shares of stock in domestic corporations represented by certificates in such deposit box, shares in a western real estate trust, the property of which is held by trustees resident in this Commonwealth, represented by certificates in such deposit box which are transferable only at the office of the trustees in this Commonwealth, and money paid voluntarily in this Commonwealth to the ancillary executor upon debts due to the estate from non-residents; but shares of stock in foreign corporations represented by certificates in such safe deposit box in this Commonwealth are not "found here" within the meaning of R. L. c. 143, and should not be administered under the provisions of that statute.

BILL IN EQUITY, filed in the Supreme Judicial Court on November 8, 1912, by the ancillary executors, appointed in this Commonwealth, of the will of Almon D. Hodges, junior, whose domicil at the time of his death was at San Francisco in the State of California, and whose will, with the plaintiffs as executors, was proved in that State, for instructions as to what part of the personal property described in the bill of the various classes mentioned in the opinion was found in this Commonwealth within the meaning of R. L. c. 143, § 1.

The case came on to be heard before *De Courcy,* J., who at the request of the parties reserved it upon the pleadings and an agreed statement of facts for determination by the full court.

E. H. Warren, for the plaintiffs.

C. A. Bunker, for the defendant Almon D. Hodges.

A. P. Carter, guardian *ad litem* of Frederick Hodges, *pro se.*

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RUGG, C. J. This is a suit in equity by ancillary executors for instructions as to their duties. The testator was domiciled in the State of California. His will was admitted to probate in that State. Thereafter a copy of it was filed as a foreign will in the Probate Court for Suffolk county in this Commonwealth, and letters ancillary issued to the plaintiffs who thus are executors by appointment of each State court. Proceedings have been brought against them in the California courts, seeking their removal on the ground that they have failed to account in that State for personal property, for which the plaintiffs feel themselves to be accountable in Massachusetts. Under these circumstances the executors rightly may ask the direction of this court. *Stevens* v. *Warren*, 101 Mass. 564.

The testator during his lifetime leased a safe deposit box in an institution in Boston, for a term unexpired at his death. The bonds, checks and certificates of stock hereafter referred to were in this box, to which the plaintiffs were refused access until they had been appointed executors in this Commonwealth. It is enough for the needs of this decision to say that at the time of his death the testator owned real estate in Minnesota and Rhode Island, and the following classes of personal property:

(a) Miscellaneous chattels.

(b) Coupon bonds of certain foreign corporations.

(c) Registered bonds of certain foreign corporations.

(d) Certificates for shares of stock in a corporation organized under the laws of Massachusetts.

(e) Certificates for shares in the Western Real Estate Trust.

(f) A deposit in the State Street Trust Company, also one in the Merchants National Bank, both doing business in Boston.

(g) Certificates for shares of stock in various corporations not organized under the laws of Massachusetts.

(h) Two uncashed checks payable to the order of the testator, drawn on banks in Boston.

(i) Claims for rent under leases of the real estate in Minnesota and Rhode Island, paid voluntarily to the plaintiffs in the county of Suffolk.

(j) A claim for money lent which was paid by the debtor to the plaintiffs in the county of Suffolk.

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The question is, for which of these items of property are the ancillary executors accountable in the Probate Court of Massachusetts. R. L. c. 143, § 1, provides that when administration is taken in this Commonwealth on the estate of a non-resident, "his estate found here shall" be administered as provided later in the chapter. The decision must turn on the determination of how many of the items referred to are "estate" of the testator "found here."

No serious question is or could be made that this language includes the property described under classes (a), (b), (f) and (h). *Pinney* v. *McGregory*, 102 Mass. 186. It also is plain that the registered bonds, being class (c), were property found within the Commonwealth. Bonds, being specialties, have a situs where found. *Callahan* v. *Woodbridge*, 171 Mass. 595. *Selliger* v. *Kentucky*, 213 U. S. 200, 204. *In re Morgan*, 150 N. Y. 35. Class (d), being certificates for shares of stock in a domestic corporation, the domicil of the corporation being within the Commonwealth, were found here by the ancillary executors and should be accounted for in our courts. *Greves* v. *Shaw*, 173 Mass. 205. Class (e), the shares in the Western Real Estate Trust, come within the same rule. The trustees are resident in this Commonwealth, and their home business office is here, where only can the certificates be transferred upon surrender and new certificates issued. The certificate holder is at least the owner of an undivided equitable interest in the property held by the trustees. There is on principle in this respect no distinction between such certificate and a certificate for shares of stock in a domestic corporation. This is virtually decided by *Kinney* v. *Treasurer & Receiver General*, 207 Mass. 368, 371. *Peabody* v. *Treasurer & Receiver General*, *post*, 129.

Class (g), being certificates for shares of stock in corporations not organized under the laws of this Commonwealth, presents the most difficult question. A certificate for shares of stock in a corporation, although evidence of title, does not constitute the title. It is not the stock. "Shares in a corporation are not chattels personal susceptible of possession, actual or constructive. . . . A share in a corporation is a right to participate in the profits, or in a final distribution of the corporate property pro rata." *Field* v. *Pierce*, 102 Mass. 253, 261. Failure on the part of a corporation

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to issue the certificate does not impair the rights of a stockholder who is notwithstanding entitled to be treated as such. *Old Dominion Copper Mining & Smelting Co.* v. *Bigelow*, 203 Mass. 159, 198, and cases cited. A certificate of stock is not necessary to the existence of the property. "It certifies to a fact which exists independently of itself." *Pacific National Bank* v. *Eaton*, 141 U. S. 227, 234. The paper upon which the certificate is printed is not the thing of value, but the ownership in the fractional part of the assets of the corporation. This analysis of the nature of a certificate of stock makes it difficult to conceive of the certificate itself as capable of having an independent situs. No doubt modern commercial usage treats certificates of stock as possessing some of the attributes of property. They are generally bought and sold and pass by delivery when properly indorsed like ordinary chattels, but such transfers are subject to equities in favor of the owner named in the certificate, and title ordinarily can be transferred only on the books of the company upon surrender of the certificate. *Baker* v. *Davie*, 211 Mass. 429, 437. They may be hypothecated and pledged, and be the subject of replevin or an action of conversion. Statutes may provide for their attachment. For some purposes and under some circumstances certificates of stock may be more than evidence and may possess some of the incidents of property and be "a constituent of title." *Hatch* v. *Reardon*, 204 U. S. 152, 161. *Simpson* v. *Jersey City Contracting Co.* 165 N. Y. 193. *Merritt* v. *American Steel-Barge Co.* 24 C. C. A. 530, 537. *Opinion of the Justices*, 196 Mass. 603. *Puget Sound National Bank* v. *Mather*, 60 Minn. 362. Nevertheless, we are aware of no decision which has gone to the extent of holding certificates of stock to be the equivalent of the shares they represent, or to be the shares themselves, or to be capable of an independent situs except possibly by express statute. See *Buck* v. *Beach*, 206 U. S. 392. They bear many analogies to deeds of real estate or bills of sale of personal property. We are able to perceive no reason for holding them in a case like this to be the property itself or anything more than evidence of it. It is anomalous to think of such property having a possibility of a situs in three different places, namely, at the domicil of the owner, at the domicil of the corporation and in the jurisdiction where the certificate itself may chance to be. To this

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effect are the decisions: *In re James*, 144 N. Y. 6; *Lockwood* v. *United States Steel Corp.* 153 App. Div. (N. Y.) 655; *Richardson* v. *Busch*, 198 Mo. 174. This result is in harmony with the view expressed in *Kingsbury* v. *Chapin*, 196 Mass. 533, although not covered by that decision. It is not necessary to decide whether, if it should be impossible as a practical matter to obtain manual possession of the certificates of stock in a foreign corporation belonging to a deceased non-resident, but within this Commonwealth, letters ancillary from our Probate Court might issue for the purpose of securing actual possession of them.

Classes (i) and (j), being debts due to the estate of the testator from non-residents, which have been paid in this Commonwealth to the plaintiffs in their capacity as ancillary executors, constitute property which has come to their hands in this Commonwealth and therefore is found here and must be accounted for by them here. *New England Mutual Life Ins. Co.* v. *Woodworth*, 111 U. S. 138, 144.

The plaintiffs are instructed that all of the personal property described in the schedule is "estate" of the testator "found" within the Commonwealth, and must be administered in accordance with the provisions of R. L. c. 143, except the certificates of stock in foreign corporations, which under the circumstances here disclosed follow the situs of the domicil of the testator and must be accounted for under the laws of that jurisdiction.

So ordered.

CHARLES A. STROUT, trustee, *vs.* UNITED SHOE MACHINERY COMPANY & others.

Suffolk. March 17, 18, 1913. — May 24, 1913.

Present: RUGG, C. J., MORTON, LORING, SHELDON, & DE COURCY, JJ.

Equity Pleading and Practice, Amendment. *Equity Jurisdiction*, Laches.

The statutory provisions authorizing amendments by a change of parties and otherwise, now included in R. L. c. 173, § 48, although not made applicable to suits in equity by their express terms, have been treated as applying to such suits or adopted in equity practice by analogy.

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Where, on a report of a suit in equity to this court by a judge of the Superior Court for determination of the question, whether an amendment changing the plaintiff and stating the cause of action in a new form was allowed properly, it appears that the amendment was allowed upon arguments and statements by counsel for the respective parties, but these statements are not reported, it is impossible for this court to review the action of the judge, which must have been based in part upon such statements and inferences drawn from them.

An amendment in a suit in equity, changing the plaintiff and substituting a new form of the bill, properly may be allowed, if the original plaintiff consents, even after a rescript has been issued by this court ordering that the bill be dismissed.

It is not a conclusive objection to the allowance of a motion to amend a bill in equity that by reason of the allowance complicated issues may have to be heard involving a consideration of the laws of a foreign State and the powers of officers appointed by its courts.

A suit in equity, originally brought by minority stockholders in a Maine corporation against the corporation and its officers for an accounting as to alleged wrongdoing in the management of the corporation, was reported to this court from the Superior Court for determination of the question, whether a judge of the Superior Court properly had allowed amendments, which had been presented about ten years after the suit was brought and over a year after a rescript had issued from this court directing that the bill be dismissed because it did not appear that it was brought in a proper representation capacity, and which substituted as plaintiff a successor to a trustee of the corporation's assets who eight and one half years before had been appointed in dissolution proceedings in Maine, and substituted a bill of a different form with allegations of new facts, and it was *held* that it could not be said that such laches, either of the original plaintiffs or of the substituted plaintiff, appeared upon the record as to make the allowance of the amendments improper as a matter of law.

BILL IN EQUITY, filed in the Superior Court on November 29, 1902, by individual stockholders of the Goddu Sons Metal Fastening Company, a Maine corporation, against the United Shoe Machinery Company and certain stockholders, officers and directors of the Goddu Sons Metal Fastening Company to compel an accounting as to certain alleged wrongdoings in the management and conduct of the business and property of the Goddu Company.

Demurrers to the original bill were sustained on April 6, 1903. On April 18, 1905, the plaintiffs were allowed to file a substitute bill, to which the defendants demurred. The questions raised by the demurrers were reserved by *Fessenden*, J., for determination by this court, and on September 5, 1911, in accordance with a decision reported in 209 Mass. 539, a rescript was issued order-

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ing that the demurrers be sustained and the bill dismissed. On September 13, 1911, the defendants filed a motion for a final decree in accordance with the rescript.

On December 23, 1912, Charles A. Strout, trustee of the Goddu Sons Metal Fastening Company, filed a motion to be substituted as the plaintiff and for leave to file a substitute bill. The substitute bill contained the following paragraph with regard to Strout:

"5. In pursuance of said scheme and conspiracy in June, 1904, the defendant Shoe Company using the majority of stock acquired as aforesaid, caused to be filed a bill in equity under the laws of the State of Maine to dissolve said Goddu Company, according to law, and thereafterwards the Supreme Judicial Court of the State of Maine in February, 1905, dissolved said Goddu Company, and appointed a trustee to wind up its affairs; said trustee remained dormant and inactive, and in 1911 said court accepted the resignation of said trustee and appointed the plaintiff, Charles A. Strout successor trustee, and thereby all the assets of said Goddu Company, and all the rights of action of said corporation became vested in said Strout, trustee, for the purposes of liquidation and winding up, as provided in the statutes of the State of Maine and in said decree of said Supreme Judicial Court, and the plaintiff avers that by the illegal conspiracy aforesaid and the illegal acts of the defendants in execution thereof, the property, assets and business of said Goddu Sons Metal Fastening Company have been greatly damaged and impaired."

The motion was heard by *Fessenden*, J., on arguments and statements by counsel for the several parties. No evidence was offered. The motion was allowed and the case was reported by the judge, with the following stipulations:

"If I was right in allowing the motion of said Strout under the circumstances and against the objections of the defendants, my order allowing the motion is to stand and the case is to be remanded to the Superior Court for such further proceedings as justice and equity may require. If, however, I erred in allowing the motion of said Strout under the circumstances and against the objections of the defendants, then the order allowing the amendment is to be reversed and the defendants' motion for a final decree is to be granted and a final decree is to be entered in the Superior Court dismissing the bill."

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Other facts are stated in the opinion.

J. R. Dunbar & S. L. Whipple, (*A. Lincoln* with them,) for the plaintiff.

C. A. Hight, for the defendants.

RUGG, C. J. This case now comes before us on a report from a judge of the Superior Court who, after the decision in 209 Mass. 539, ordering that the bill be dismissed, allowed a motion substituting Charles A. Strout, trustee of the Goddu Sons Metal Fastening Company, as the plaintiff and an amended bill of complaint. The case has been elaborately and ably argued in behalf of the defendants, but in the view we take the points upon which the decision hinges lie within narrow compass.

The defendants challenge the power of the court to allow such an amendment. The power of the court in this regard is very broad. R. L. c. 173, § 48, although not in express terms governing suits in equity, has been treated as applying to them and stating general principles touching amendments in equity. *Drew* v. *Beard,* 107 Mass. 64, 76. *King* v. *Howes,* 181 Mass. 445. *Day* v. *Mills,* 213 Mass. 585, 587, and cases cited. At the lowest the practice prescribed by the statute is adopted by analogy in equity.

The allowance of the amendment by the court is made "conclusive evidence of the identity of the cause of action." *Tracy* v. *Boston & Northern Street Railway,* 204 Mass. 13, 17. Moreover, although no evidence was offered before the trial judge he heard statements of respective counsel. These statements are not reported and it is impossible for us to review the action of the judge, which must have been based in part upon such statements and the inferences rationally drawn from them. Under these circumstances it is not necessary to analyze the amended bill nor compare it nicely with the one originally filed. It is enough to say that the damages which accrued to the original plaintiffs and which they sought in their own names can be recovered only by the corporation in which they were stockholders, and perhaps only in the present form of action. It was competent for the court to grant the amendment even after rescript ordering final judgment. *Merrill* v. *Beckwith,* 168 Mass. 72.

The motion of Mr. Strout must be assumed to have been made with the consent and approval if not by the active co-operation

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of the original plaintiffs. It was made by the same counsel who brought the suit originally. The case is distinguishable, therefore, from those relied on by the defendants, where some third person sought against objection to inject himself into the case as a party plaintiff.

It is not fatal as matter of law to the allowance of a motion to amend, that at the trial complicated issues may be raised involving a consideration of the laws of a foreign State and the powers of officers appointed by its courts.

It cannot be said that upon this record appear such laches of the original plaintiffs or of the substituted plaintiff as to prevent the allowance of the amendment as matter of law. The question of laches, if properly raised at the hearing, is not precluded by anything now said.

In accordance with the terms of the report the entry may be,

Order allowing motion to stand and case remanded to Superior Court for further proceedings.

ROYAL B. YOUNG *vs.* NATHANIEL C. B. HAVILAND & others.

Suffolk. March 18, 1913. — May 24, 1913.

Present: RUGG, C. J., MORTON, LORING, SHELDON, & DE COURCY, JJ.

Equity Jurisdiction, For an accounting, Suit by bondholders of corporation for preservation of security. *Corporation*, Rights of bondholders, Liability of directors. *Mortgage. Trust. Mine.*

A bill in equity by holders of bonds of a corporation against the directors of the corporation, the corporation and two trustees to whom the corporation has conveyed its property to secure the payment of bonds issued by it cannot be maintained for an accounting as to funds which the plaintiffs allege should be paid to the trustees because of waste and strip committed by persons to whom the corporation had leased its property, unless the plaintiffs prove that a demand was made upon the trustees to act and that they refused or neglected to do so, or unless facts appear which make it plain that such a demand would have been useless. The mere facts that one of the trustees did nothing more than to approve of the contracts made by the corporation with the lessees, such approval not appearing to have been wrongful or unwise, and to consult occasionally concerning the payment of interest on the bonds

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or a possible sale of the property with the treasurer, in whom he had complete confidence and to whom he left the management of the mortgaged property, and that the trustees "were negligent in performing their duty as trustees in that they took no steps to enforce such an accounting," are not sufficient to show that it would be useless to demand of the trustees that they take the action which the plaintiff contends they should have taken.

In a suit in equity by holders of bonds of a mining corporation against the directors of the corporation, the corporation and trustees to whom the corporation conveyed its mining property to secure the payment of the bonds for an accounting as to funds which the plaintiff alleges should be paid to the trustees because of waste and strip committed by persons to whom the corporation had leased its mines, the directors cannot be held liable personally where it does not appear that they personally received any money by reason of the leases, and where a master who heard the case reports that he is unable to determine whether the operation of the property by the lessees was reasonable or not and it appears that both the corporation and the lessees had a right under the mortgage agreement to work the mine reasonably and properly.

BILL IN EQUITY, filed in the Superior Court on January 1, 1912, and afterwards amended, by Royal Bosworth Young "and such other bondholders of the Outlook Mining Company as may hereafter join as parties plaintiff" against the directors of that corporation and two trustees to whom the corporation had conveyed its mining property to secure the plaintiff and other bondholders, for an accounting by the defendant directors as to moneys received from one Suessdorf and Nuland, lessees and intending purchasers of the mining property, and for a decree directing that such moneys be paid over to the defendant trustees for the benefit of the bondholders because the lessees had wasted and stripped the mine to that extent.

As against the trustees the bill was taken *pro confesso*.

The suit was referred to William Harold Hitchcock, Esquire, as master. His report was confirmed by *Crosby*, J., who filed a memorandum stating the following among other findings and rulings:

"I find that the acts of the officers and directors of the company in allowing Suessdorf and Nuland to prosecute the work upon the property in the manner found by the master has resulted in greatly depreciating the property and the security of the bondholders under the mortgage, and that such use of the property has been in violation of the terms of the mortgage given by the company to secure the bonds, particularly the first and eleventh articles of the mortgage.

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"The company as mortgagor, or any one rightfully acting under it as above stated, could carry on the business of mining upon the property in the usual and ordinary way but could not so conduct the business as to seriously impair and deplete the value of the property and thereby depreciate the security created by the mortgage.

"The directors having violated the terms of the mortgage and having by their acts and omissions caused this property to be greatly impaired in value must account to the trustees for the moneys so received under the contract with Suessdorf, which, under the circumstances is not to be treated as income but as payments on account of the purchase price for the property."

A final decree accordingly was entered in substance ordering the defendant directors "jointly and severally" to pay to the defendant trustees for the benefit of the bondholders $10,239.69, of which $2,769.68 was to be paid from the corporation's treasury. The defendant directors appealed.

Other facts are stated in the opinion.

H. S. Davis & F. W. Johnson, for the defendant directors.

L. Marks, (*R. B. Young* with him,) for the plaintiff.

SHELDON, J. The plaintiff holds some of the bonds secured by a mortgage given by the defendant corporation to the defendants Simpson and Whittemore as trustees for the bondholders. The suit is brought to enforce the alleged right of the bondholders to the money received by the corporation or its officers under certain agreements made by it first with Suessdorf and then with Nuland as lessees and intending purchasers of its mine.

It is settled that such a suit ought ordinarily to be brought by the trustees, who represent all the bondholders, for whom they are trustees. But the *cestuis que trust* are not without remedy if the trustees will not do their duty. They may sue in their own names or any one of them may so sue in behalf of all, if this is necessary to avoid a failure of justice. *O'Beirne* v. *Allegheny & Kinzua Railroad,* 151 N. Y. 372. *Weetjan* v. *St. Paul & Pacific Railroad,* 4 Hun, 529, 539. Accordingly the plaintiff must show that a demand has been made upon the trustees to take action themselves, and that they have refused or neglected to do so, or else that the circumstances make it plain that such a demand would be useless. *Falmouth National Bank* v. *Cape*

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Cod Ship Canal Co. 166 Mass. 550, 567. *Dillaway* v. *Boston Gas Light Co.* 174 Mass. 80. *General Electric Co.* v. *La Grande Edison Electric Co.* 79 Fed. Rep. 27, and 87 Fed. Rep. 590. *Consolidated Water Co.* v. *San Diego*, 89 Fed. Rep. 272. This corresponds to the rule that one or more stockholders may sue in their own names to enforce rights of the corporation, if and only if redress cannot be obtained through the corporation itself. *Brewer* v. *Boston Theatre*, 104 Mass. 378. *Dunphy* v. *Traveller Newspaper Association*, 146 Mass. 495. *Doherty* v. *Mercantile Trust Co.* 184 Mass. 590. *Enos* v. *Church of St. John the Baptist*, 187 Mass. 40. *Von Arnim* v. *American Tube Works*, 188 Mass. 515. No demand has been made upon these trustees. We assume that the bill, as amended, avers circumstances enough to show that such a demand would have been unavailing. But the master has merely found that Simpson, one of the trustees, has done nothing more than to approve the contracts made by the corporation with Suessdorf and with Nuland (which does not appear to have been wrongful or even unwise action on his part), and occasionally to consult with Dunbar, the treasurer of the corporation, concerning the payment of interest on the bonds or a possible sale of the property. He had, the master found, complete confidence in Dunbar, and left the management of the property in his hands. There is also a finding that both of the trustees "were negligent in performing their duty as trustees in that they took no steps to enforce such an accounting." But this is not enough. If a demand had been made upon them to act, or if their attention had been called to the reasons for doing so, no one can say that they would not have acted promptly and decisively. This falls far short of what has been required by our decisions already referred to. For this reason, the bill cannot be maintained against the defendants who have appealed from the decree.

Even if this objection could have been got over, it would have been difficult upon the facts found to hold the directors and treasurer of the corporation personally liable. They stood in a fiduciary relation to the corporation. But their duties and their accountability were primarily to it, and not to its bondholders or other creditors. *Lyman* v. *Bonney*, 118 Mass. 222. *Frost Manuf. Co.* v. *Foster*, 76 Iowa, 535. *Penney* v. *Bryant*,

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70 Neb. 127. *Force* v. *Age-Herald Co.* 136 Ala. 271. *Hart* v. *Hanson,* 14 No. Dak. 570, 571. And see Thompson on Corporations, § 1295, and Cook on Corporations, § 682. In *Greenfield Savings Bank* v. *Abercrombie,* 211 Mass. 252, it was to the corporation that the defendants were held liable. The directors did not personally receive any of the money for which they were held in the decree, nor did Dunbar, the treasurer, receive it otherwise than in his official capacity, in the right of the corporation and as its agent.

Moreover, so far as the plaintiff's case rests upon the claim that the directors allowed Suessdorf and Nuland to strip and exhaust the mine unreasonably, the master has not found this fact. He was unable to determine whether the operation of the mine had been reasonable and proper or not. But both the corporation and its lessees had the right to work the mine reasonably and properly, and if this resulted in its exhaustion, that must be the misfortune of those who have chosen to invest their money upon uncertain and wasting security. *Searle* v. *Sawyer,* 127 Mass. 491, 493. *Capner* v. *Flemington Mining Co.* 2 Green Ch. 467. *Vervalen* v. *Older,* 4 Halst. 98. *Ward* v. *Carp River Iron Co.* 47 Mich. 65, and 50 Mich. 522. The rights of a mortgagee against the mortgagor correspond to those of the landlord against his tenant or of a reversioner against the tenant for life; Rugg, J., in *Delano* v. *Smith,* 206 Mass. 365, 370; and the rule which we have stated has been applied where those or similar relations existed. *Billings* v. *Taylor,* 10 Pick. 460. *Gaines* v. *Green Pond Iron Mining Co.* 6 Stew. 603. *Irwin* v. *Covode,* 24 Penn. St. 162, 166, 167. *Eley's appeal,* 103 Penn. St. 300, 307. *Clavering* v. *Clavering,* 2 P. Wms. 388. *Stoughton* v. *Leigh,* 1 Taunt. 402.

The trustees Simpson and Whittemore have not appealed from the decree. As to them it must stand. As to the other defendants, the decree must be reversed.

So ordered.

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WILLIAM A. EDWARDS & another *vs.* COLUMBIA AMUSEMENT COMPANY.

Suffolk. March 19, 1913. — May 24, 1913.

Present: RUGG, C. J., MORTON, LORING, SHELDON, & DE COURCY, JJ.

Equity Jurisdiction, Res judicata, To regain possession of real estate. *Landlord and Tenant. Summary Process for Possession of Land. Judgment.*

The owner of certain premises made a lease of them for a term of more than seven years. For six years the lessee did not record the lease as required to do by R. L. c. 127, § 4, and, before it was recorded, the premises had been conveyed by mesne conveyances to one who threatened to oust the lessee of possession, and the lessee by a suit in equity sought to enjoin such action, alleging that the defendant and all his predecessors in title had had actual notice of the lease. While the suit was pending, the defendant brought an action of summary process for possession of the land against the plaintiff under R. L. c. 181 and, after a full trial of the question, whether the defendant and his predecessors in title had notice of the plaintiff's lease, obtained a judgment therein. The plaintiff did not appeal therefrom, but surrendered possession to the defendant and amended his bill in equity, setting up the facts as to the judgment in the action of summary process for possession of the land and his surrender of possession, and praying for a restoration of possession. *Held,* that the judgment in the action for summary process was *res judicata* barring the maintenance of the suit in equity. *Held, also,* that the bill in equity as amended was not an "action . . . brought . . . to recover the lands or tenements in question," to which by R. L. c. 181, § 9, the judgment in the action of summary process would not be a bar, because the plaintiff did not therein seek to settle the title to the land, but only the right to present possession.

BILL IN EQUITY, filed in the Supreme Judicial Court on April 27, 1911, and amended on June 13, 1911, in which the plaintiffs alleged in substance that they rightfully were in possession of a portion of the Grace Building, so called, in Boston, under a lease to them from the owner dated September 21, 1904, for a period of nine years and nine months; that, through mesne conveyances of the equity of redemption subject to a mortgage on the premises dated November 3, 1909, and mesne conveyances following a foresclosure by sale under the mortgage, the defendant had acquired the owner's interest in the premises; but that the defendant and all its predecessors in title, at the time when they acquired title, knew of the plaintiffs' lease, and that the

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defendant was threatening to deprive the plaintiffs of possession. The prayers of the bill were for a temporary and a permanent injunction restraining the defendant from interfering with the plaintiffs' possession.

The bill also was amended on October 6, 1911, and January 23, 1912, by further alleging that on May 3, 1911, (after this suit was begun,) the defendant brought against the plaintiffs an action of summary process under R. L. c. 181, in the Municipal Court of the City of Boston for possession of the premises and on June 30, 1911, obtained a judgment in its favor therein, that the plaintiffs did not appeal from such judgment but surrendered peaceable possession to the defendant, which was accepted. The prayers as amended were for an adjudication that the plaintiffs' lease was valid and that the defendant be ordered to surrender possession of the premises to the plaintiffs.

The defendant in its answer alleged, among other things, that the plaintiffs' lease was not recorded until September 17, 1910, denied the notice to the defendant and its predecessors in title alleged in the bill, and stated that the judgment of the Municipal Court of the City of Boston in the proceedings of summary process for possession of the land brought by the defendant barred this suit.

The suit was heard by *Braley*, J., who, among other things, found that, although the plaintiffs' lease was not recorded before the mortgage under which the defendant claimed its title, the defendant and all its predecessors in title had actual notice of the existence of the lease, and ruled that, under R. L. c. 181, § 9, the judgment in the action in the Municipal Court of the City of Boston to recover possession was not a bar to the bill, which might be maintained by the plaintiffs to recover possession. He further found, "however, as a fact, so far as it may be material, that evidence as to whether or not the several incumbrancers on the Grace property and the Columbia Amusement Company subsequent to the plaintiffs' lease had notice of the lease at the time when they severally acquired their title, was introduced in the trial of the action to recover possession, and this issue was there raised." By his order an interlocutory decree was made adjudging the plaintiffs' lease valid and referring the case to a master upon certain issues not now material.

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After the filing of the master's report, the suit was further heard by *Sheldon*, J., by whose order a final decree was entered directing the defendant to deliver possession to the plaintiffs on terms not now material. The defendant appealed.

L. E. Warner, for the defendant.

H. A. Brown, for the plaintiffs.

SHELDON, J. The fundamental question is whether the judgment rendered in the Municipal Court of the City of Boston in favor of the present defendant against these plaintiffs for possession of the premises described in the bill is a bar to the maintenance of the present suit.

Since the filing of the amendment or supplemental bill in October, 1911, and of the amendment allowed on January 23, 1912, the plaintiffs have asked only that their lease, as to the premises described in the bill, be declared valid, and that the defendant be ordered to surrender to the plaintiffs possession of said premises.

The judgment in the Municipal Court was rendered after the filing of the original bill in this case, but before the filing of the supplemental bill. It was rendered upon an action brought by the present defendant under R. L. c. 181, against these plaintiffs, to recover possession of the premises. Due service of process was had, the parties appeared, and the case was tried in the Municipal Court. At that trial, evidence was put in as to whether or not the several incumbrancers on the Grace property and the defendant had notice of these plaintiffs' lease, and that issue was raised. The present plaintiffs did not appeal from that judgment, but surrendered possession. They now seek to be restored to that possession.

The validity against the defendant of the plaintiffs' lease depended on the question whether the defendant or its predecessors in title had notice of that lease. It ran for more than seven years, and was not recorded until after the title under which the defendant claimed had accrued. R. L. c. 127, § 4. That issue was raised at the time in the Municipal Court, and the judgment in favor of this defendant could not have been given unless that issue had been found in its favor. It could not otherwise have been found, under R. L. c. 181, § 3, that the defendant was entitled to possession. Moreover, as the plaintiffs had been in quiet possession for more than three years before the commence-

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ment of that action, the judgment could not have been entered unless it had been found that their estate had been ended; R. L. c. 181, § 10; but no claim was made that it had been ended, except upon the ground that it had not been seasonably recorded, and that neither the defendant nor its predecessors in title had had any notice thereof. Indeed there is nothing to indicate that any other issue was raised at the trial. The finding accordingly must have been made that there had been no such notice. That finding became *res judicata* between these parties. *Black River Savings Bank* v. *Edwards*, 10 Gray, 387. *Jennison* v. *West Springfield*, 13 Gray, 544, 545. *Burlen* v. *Shannon*, 99 Mass. 200, 203. *Jamaica Pond Aqueduct* v. *Chandler*, 121 Mass. 1, 2. *Berman* v. *Henry N. Clark Co.* 194 Mass. 248. Neither party can raise the question again in other litigation, unless this result is prevented by the language of R. L. c. 181, § 9: "The judgment in an action under the provisions of this chapter shall not be a bar to any action thereafter to be brought by either party to recover the land or tenements in question."

But the present action is not brought to recover the premises described in the bill. The plaintiffs seek merely to be restored to the possession under the lease which they set up. They do not seek to settle the title, but only the right to the present possession, and that is the peculiar function of the summary remedy provided by R. L. c. 181. *Page* v. *Dwight*, 170 Mass. 29, 35, 40. Since the allowance of the amendment or supplemental bill under which the suit is now prosecuted, it is merely the summary process given by the statute, put into the shape of a bill in equity. *Weiss* v. *Levy*, 166 Mass. 290. Certainly it is not such a new action as is contemplated by the statute last cited, for the recovery of the property itself.

The judgment of the Municipal Court, not having been appealed from but remaining in full force and effect, is a bar to the maintenance of this bill, as it would have been a bar to the bringing of another action by these plaintiffs under R. L. c. 181, merely to raise again the same issues which had been determined in the prior action. Neither such a supposed second action nor this bill raises any new issue or seeks to recover the premises themselves, or anything more than the bare possession.

It is unnecessary to consider the other questions which have

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been argued. Both the interlocutory decree appealed from and the final decree must be reversed, for the reason that on the facts appearing the bill cannot be maintained.

So ordered.

FRANCIS PEABODY, JR., & another, executors, *vs.* TREASURER AND RECEIVER GENERAL & others.

Suffolk. March 19, 1913. — May 24, 1913.

Present: RUGG, C. J., MORTON, LORING, SHELDON, & DE COURCY, JJ.

Tax, On successions. *Words*, "Within the jurisdiction of the Commonwealth."

Shares of an unincorporated real estate trust which includes both real and personal property are subject to the succession tax imposed by St. 1907, c. 563, § 1, as "property within the jurisdiction of the Commonwealth," although the holder of the shares at the time of his death had his domicil in another State and the certificates representing his shares were in a third State, and although the instrument creating the trust states that the shares are to be personal property as to title and are to be held, bequeathed, assigned and distributed as personal estate, if all the property of the trust, its place of business, all its books and the domicil of all the trustees are in this Commonwealth, where only shares can be transferred, and if the instrument creating the trust places the legal title to the property in the trustees with control over it, subject to a limited direction on the part of the shareholders, and with power in the trustees to hold and manage both real estate and personal property and to distribute net earnings among the shareholders, but no power to bind the shareholders personally.

PETITION, filed in the Probate Court on January 30, 1911, by the executors of the will of Henry Belknap, late of Shelter Island in the State of New York, for instructions as to whether they should pay a succession tax on certain shares in the Terminal Hotel Trust, the Hotel Somerset Trust, the Conservatory Apartments Trust, the Devonshire Building Trust and the Claverly Trust, which were owned by the testator at the time of his death and the certificates representing which were at that time in Providence in the State of Rhode Island.

In the Probate Court the case was heard by *George*, J., who ordered that the tax should be paid. On appeal to this court by certain legatees, the facts were agreed upon and the case was reserved by *De Courcy*, J., for determination by the full court.

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The material facts are stated in the opinion.

R. L. Raymond, for the petitioners, stated the case.

F. T. Field, for the Treasurer and Receiver General.

W. B. Luther, for the other respondents.

RUGG, C. J. This is a petition brought under St. 1909, c. 490, Part IV, § 21, by the executors of the will of a testator who died a resident of New York, for instructions whether certain property of the testator was "within the jurisdiction of the Commonwealth" within the meaning of those words in St. 1907, c. 563, § 1, and thus subject to an inheritance tax. This petition relates only to certain shares in five different real estate trusts. All the property both real and personal of all the trusts was in this Commonwealth, and all the trustees lived here. The places of business and books of the trusts were also in Massachusetts, where alone the certificates could be transferred upon surrender and new ones issued in their stead. It is not necessary for the purposes of this judgment to state in detail the terms of the several trust instruments. In general the subscribers join for the purpose of purchasing and developing certain real estate and agree to contribute money therefor. The legal title to all the property of each of the trusts is in the trustees, who have control over the property with power to invest and hold personal property and to distribute net earnings among the shareholders, but no power to bind the shareholders personally. The trustees are subject to a limited direction on the part of the shareholders. Two of the trusts contain the further provision that the shares represented by the certificates are to be and remain as to title personal property only, and be held, bequeathed, assigned and distributed as personal estate.

The language of the taxing statute indicates "an intention on the part of the Legislature to tax all property that it has the power to tax. The statute is as broad as the jurisdiction of the Commonwealth." Knowlton, C. J., in *Kinney* v. *Treasurer & Receiver General*, 207 Mass. 368, 369.

The nature of the interest held by shareholders under trust agreements similar to those here involved has been before the courts frequently. In *Kinney* v. *Treasurer & Receiver General*, the legal title to real and personal estate was in the trustees, the interests of the individual contributors to the trust being repre-

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sented by deposit books which were assumed to be transferable. The court said "This property was a valuable interest in real estate . . . the legal title to which was held by trustees. The testator held an equitable interest in it. . . . All this property is subject to the tax upon succession prescribed by our law." In *Williams* v. *Boston*, 208 Mass. 497, at 500, it was said: "There is no doubt that . . . [the certificate holders in the trust] are joint owners of the property, for whose joint benefit the business is being carried on." In *Attorney General* v. *New York, New Haven, & Hartford Railroad*, 198 Mass. 413, at 429, it was said that such certificate holders are "equitable tenants in common," and in *Hussey* v. *Arnold*, 185 Mass. 202, at 204, they were referred to as "having equitable interests in the property." In *Howe* v. *Morse*, 174 Mass. 491, at 503, it was said that "the shareholders for the time being have the whole equitable estate in the corpus of the trust." In numerous decisions it has been held that the certificate holders or shareholders in trusts differing in this respect not substantially from the trusts involved in the case at bar were partners and not merely co-owners. *Hoadley* v. *County Commissioners*, 105 Mass. 519. *Gleason* v. *McKay*, 134 Mass. 419. *Phillips* v. *Blatchford*, 137 Mass. 510. *Ricker* v. *American Loan & Trust Co.* 140 Mass. 346. *Taber* v. *Breck*, 192 Mass. 355.

It is not necessary to analyze with greater nicety the precise character of the property interest of a shareholder under each of the trusts. It is true of all of them that their rights are equitable interests in tangible property within this Commonwealth. While the legal title is in the trustees, their ownership is fiduciary, and the certificate holders are the ultimate proprietors of the property, which is held and managed for their benefit, and which must be divided among them at the termination of the trust. Their rights constitute not choses in action but a substantial property right. In this respect the case is indistinguishable in principle from shareholders in a domestic corporation. *Greves* v. *Shaw*, 173 Mass. 205. The fact that the certificates themselves were not within the Commonwealth is an immaterial circumstance. *Kennedy* v. *Hodges*, *ante*, 112.

Decree of Probate Court affirmed.

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CHARLES C. READ & another, executors, *vs.* WILLARD HOSPITAL & others.

Suffolk. March 21, 1913. — May 24, 1913.

Present: RUGG, C. J., MORTON, LORING, SHELDON, & DE COURCY, JJ.

Charity. Devise and Legacy, Charity. *Trust*, Charitable.

Where by a provision in a will a legacy of $5,000 is given to a certain private charitable corporation, which, although in existence at the time of the testator's death, refuses the gift and waives its claim thereto, the legacy does not vest in such corporation, nor does it lapse; but it is a valid charitable gift, and, if there is another private charitable corporation which is established and carried on for substantially the same purpose and which apparently is the only such private institution in existence in the Commonwealth, a decree may be made, in a bill in equity by the executor for instructions, directing that the legacy be paid to the second corporation to be held by it in trust for the same purpose for which it would have been used if the first corporation had accepted it.

BILL IN EQUITY for instructions, filed in the Supreme Judicial Court on September 27, 1912, by the executors of the will of Sarah Elizabeth Read, late of Boston, against the Willard Hospital, the Frances E. Willard Settlement, the Washingtonian Home, and the Trustees of the Foxborough State Hospital, all Massachusetts corporations, and certain persons who were residuary legatees under the will.

The instructions sought were as to what disposition should be made of the following legacy contained in a codicil to the will: "Sixth. I give and bequeath to the Willard Hospital for dipsomaniacs, of Bedford, Massachusetts, the sum of Five Thousand (5000) Dollars;"

The Willard Hospital declined to receive the legacy. The Washingtonian Home and the Trustees of the Foxborough State Hospital each asked that it be permitted to receive and administer the funds. The Frances E. Willard Settlement asked that the *cy pres* doctrine be applied and the fund paid to it. The residuary legatees contended that the legacy had lapsed and fallen into the residue and that they were entitled to it.

There was an agreed statement of facts, from which the following appeared:

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The will was dated April 7, 1902. The material codicil was dated February 24, 1905. The fourth and last codicil was dated October 18, 1909.

The Willard Hospital was organized on January 31, 1900, under Pub. Sts. c. 115, relating to charitable corporations, "for the purpose of the establishment and maintenance of a hospital for the treatment of dipsomania and narcomania." It had no capital stock and paid no dividends. Some patients paid for treatment and some were treated free. They came from all parts of the United States. It was a public charity. In carrying out its purpose, it relied largely upon the services of Dr. Sidney B. Elliot, who, as superintendent and physician, had full charge of the hospital and of its business, and who was a friend of the testatrix. In the latter part of the year 1909 Dr. Elliot died, and the hospital, being unable to continue without him, was discontinued and sold with most of its real estate to the defendant Frances E. Willard Settlement. The Willard Hospital surrendered its certificate of incorporation and was dissolved on February 10, 1913.

The Washingtonian Home was incorporated in Massachusetts in 1859, "for the purpose of providing a retreat for inebriates and means of reforming them." It has carried on its work, gradually increasing it, to the present date, treating only male cases, and has a thoroughly equipped modern plant with an efficient corps of expert doctors and attendants, fully prepared to give the latest, approved treatment for the care of inebriates, and it devotes itself exclusively to this work. It has real estate at No. 41 Waltham Street in Boston, and during the year ending April 21, 1912, nine hundred and forty-six patients were treated there. The entire number of patients admitted to the Home and cared for since its incorporation up to said date is 21,955. It is a public charity, has no capital stock, and pays no dividends. It is the only charitable corporation incorporated under the laws of Massachusetts and now doing business in Massachusetts for the exclusive purpose of providing a retreat for male inebriates and means of reforming them. All the money which it receives it uses in the care and treatment of its patients, and the more money it receives the more patients it can treat. Some patients pay for treatment and some are treated free.

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They come from Massachusetts and all over the United States. It was agreed that the term "inebriate" includes those suffering from dipsomania and narcomania.

The Frances E. Willard Settlement was incorporated on July 7, 1903, "for the purpose of providing, maintaining and supporting a home or homes for young working women, or women earning very low salaries, or those training for self-support who need temporary aid, and helping in any possible way those who are strangers and need assistance; also establishing, maintaining and supporting a settlement for the social, educational and moral enlightenment and training of those with whom it comes in contact." It is a public charity, has no capital stock, and pays no dividends. In carrying out its purposes it has had occasion to minister to the needs of about two hundred females suffering from narcomania and its results, in greater or less degree. This work has consisted of providing medical diagnosis and treatment by competent physicians and of the care of the patients by competent nurses. In all cases requiring medical treatment the advice and instructions of competent physicians have been taken and followed, under the supervision of nurses whenever necessary. No particular or technical name can be given to the form of treatment prescribed, which has in each case been adapted to the special requirements of the particular patient. Since the acquisition by the Frances E. Willard Settlement of the hospital buildings and the greater part of the land formerly belonging to the Willard Hospital, this treatment of persons suffering from narcomania has been of much more value by reason of the possession of the Willard Hospital plant. The Frances E. Willard Settlement, however, does not confine its activities to the ministering to persons suffering with narcomania, which latter is but a small part of its activities under its charter. As an important adjunct to its work, it maintains a dispensary, open and free to the public, at which several competent and reputable physicians are in daily attendance, in order to advise, prescribe for and treat persons suffering from all diseases, including both dipsomania and narcomania, and many persons are relieved by this means.

The trustees of the Foxborough State Hospital are conducting a public hospital for the treatment of patients suffering from dip-

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somania or narcomania, in any of its forms, and other diseases, in accordance with the laws of the Commonwealth regulating the conduct of the Foxborough State Hospital.

The case was heard upon the agreed facts by *De Courcy*, J., and was reserved by him for determination by the full court.

C. C. Read, for the executors, stated the case.

J. E. Young, for the Washingtonian Home.

F. W. Fosdick, for the Frances E. Willard Settlement.

J. Codman, (*R. W. Dunbar*, with him,) for residuary legatees.

J. M. Swift, Attorney General, & *W. A. Powers*, Assistant Attorney General, for the Trustees of the Foxborough State Hospital.

SHELDON, J. The Willard Hospital never accepted this legacy, and now waives its claim thereto. Accordingly the legacy did not vest in it, and never became its property. *Ward* v. *Ward*, 15 Pick. 511, 525. *Burr* v. *Boston*, 208 Mass. 537, 538. So the disposition thereof could not have been determined in the former suit of the Willard Hospital, in which only the assets of the plaintiff in that suit were brought in question. According to the agreement in that suit, the present question properly was left to be passed upon in this proceeding.

But the legacy did not lapse. It was given to a charitable corporation, which could apply it only for the specific charitable purpose for which the corporation had been organized, the hospital treatment of dipsomania and narcomania. It was given, and if accepted would have been taken in trust for that purpose, just as if it had been so recited in the will. *Hubbard* v. *Worcester Art Museum*, 194 Mass. 280, 290. It was a valid charitable gift; and the only difficulty is that the trustee to which it was given, though in existence at the death of the testatrix, did not accept the trust and has since ceased to exist. All that is necessary is to appoint a new trustee, as in *Richards* v. *Church Home for Orphan & Destitute Children*, 213 Mass. 502.

If the *cy pres* doctrine were to be applied, it might be necessary to remit the case to a single justice or to a master to frame a scheme. But that is not so. All the facts have been agreed; and the case comes before us upon a reservation by the terms of which a proper decree is to be entered. The fund is small, and further expense ought to be avoided. The whole matter should be now determined, as was done in the case last cited.

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The purpose for which the Washingtonian Home was established and is carried on, though described in different words, is substantially the same as was that of the Willard Hospital. Apparently it is the only private institution of which that can be said. The testatrix preferred a private institution to be the almoner of her bounty; and as there is no reason to the contrary, we respect her preference.

We see no sufficient reason for not following the usual rule as to costs and allowances.

A decree is to be entered instructing the petitioner to pay the fund to the Washingtonian Home, to be held by it in trust for the hospital treatment of dipsomania and narcomania.

So ordered.

FORSTER MANUFACTURING COMPANY *vs.* CUTTER-TOWER COMPANY.

Suffolk. March 21, 24, 1913. — May 24, 1913.

Present: RUGG, C. J., MORTON, LORING, SHELDON, & DE COURCY, JJ.

Evidence, Best and secondary. *Equity Jurisdiction*, To restrain unfair competition, Acounting for profits, Damages.

In a suit in equity by a corporation to restrain the defendant from selling certain goods in packages made in imitation of those of the plaintiff, upon the question of the loss of profits to the plaintiff, a witness, who was the plaintiff's secretary and general manager, may be allowed to testify from memory as to the cost of production and the selling price of the goods produced by the plaintiff, if he is testifying from his personal knowledge, although books and records kept by the witness contain written statements of the same facts; and, if he is unable to recall certain items of expense, such as telegrams and express charges, which entered into the cost of the goods, this does not show conclusively that he has not such personal knowledge, because he may know the total cost without remembering all the details that went to make it up.

In a suit in equity to restrain the defendant from selling certain goods in packages made in imitation of those of the plaintiff, where the plaintiff seeks damages as well as an accounting for profits unlawfully obtained by the defendant, the plaintiff, if he prevails, although he may recover both damages and profits so far as this may be necessary for his full compensation, cannot recover as damages the profits which he would have realized if he had made the sales

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that were made wrongfully by the defendant and also recover the profits that the defendant made on the same sales. If the plaintiff suffered loss or damage from the defendant's acts for which the receipt of the defendant's profits will not compensate him, he is entitled to recover this additional amount as damages, but he cannot be allowed to recover twice for the same loss.

BILL IN EQUITY, filed in the Supreme Judicial Court on June 20, 1910, by a corporation organized under the laws of the State of Maine against a corporation organized under the laws of this Commonwealth, to restrain the defendant from selling or offering for sale any toothpicks, not manufactured by the plaintiff, in packages like those of the plaintiff or so similar thereto as to cause the defendant's goods to be mistaken for the plaintiff's goods, praying also for the assessment of damages sustained by the plaintiff by reason of the defendant's wrongful acts, and for an accounting by the defendant for the profits which had accrued to it from its alleged unlawful acts.

The case was referred to Edward S. Goulston, Esquire, as master, and thereafter was heard upon the master's report by *Morton*, J., who with the consent of the parties reserved it for determination by the full court, with a stipulation that if the full court should determine that the plaintiff was entitled to the relief prayed for, the case was to stand for further hearing upon the question of damages and profits. In a decision reported in 211 Mass. 219, this court decided that the plaintiff was entitled to the relief prayed for and ordered that the case should stand for further hearing upon the question of damages and profits.

After the rescript an interlocutory decree was made by *Hammond*, J., by which, among other things, it was ordered "that the plaintiff do recover from the defendant all profits which have accrued to or have been realized by said defendant from the sale of toothpicks in packages like or similar to certain packages used by the plaintiff and also all damages which the plaintiff has sustained by the wrongful acts of the defendant as alleged in the bill of complaint."

The case then was referred again to the master, and later was heard by *De Courcy*, J., upon the defendant's exceptions to the master's report.

The justice made a memorandum of decision as follows:

"1. The first exception to the master's report is disposed of by

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the agreement of counsel that interest on the profits should be allowed from the date of the filing of the master's report.

"2. Exceptions 2, 3, 4 and 5 are waived by the defendant.

"3. Exceptions 6 and 7 are to the failure of the master to rule that the plaintiff is not entitled to both profits and damages; and that it is entitled to nominal damages only, because of a failure to elect between profits and damages. The master rightly acted in accordance with the interlocutory decree issued upon the rescript in this case.

"4. The eighth exception is to the failure of the master to find that the plaintiff had suffered only nominal damages. In the absence of the evidence this exception cannot be sustained.

"5. The remaining exceptions relate to the competency of the testimony of the witness Woodsum. It appears from the report that he was allowed to testify as to his own knowledge of the plaintiff's cost of production and selling price, and not as to the contents of the books of account, nor a summary or calculation from them. And in taking as a basis for computing damages the average cost of the goods during the infringing period the master acted upon reasonable and practical data."

The witness Woodsum named above was the plaintiff's secretary and general manager and was called as a witness by the plaintiff.

The justice made an order overruling the defendant's exceptions, and later by his order a final decree was entered, that the defendant's exceptions to the master's report be overruled, that the report be confirmed, and "that the plaintiff do recover from the defendant the sum of $1,400, damages, and the sum of $195.93, profits realized by the defendant on sales of the infringing package, by which the plaintiff suffered no damage, and the sum of $311.59, profits realized by the defendant on sales of the infringing package, by which the plaintiff also suffered damage, with interest at six per cent on each of said sums from the date of the filing of the master's report, to wit, December 19, 1912, and its costs of suit taxed by the clerk in the sum of $103.92."

The defendant appealed.

G. P. Dike, (*C. Macleod* with him,) for the defendant.

R. Cushman, (*C. D. Woodberry* with him,) for the plaintiff.

SHELDON, J. Upon the finding of the master the witness Woodsum properly was allowed to testify as to the selling price and

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the cost of the plaintiff's product. He testified from his personal knowledge; and, that being so, his testimony was competent, although books and records kept by him contained written statements of the same facts. That he could not recall certain items of general expense, such as telegrams and expressage, which entered into the average cost of the goods, did not show conclusively that he had not such knowledge. He might know the total amount without being able to remember all the minor items that went to make up that amount. The case does not come within the rule of *Hunt* v. *Roylance*, 11 Cush. 117, relied on by the defendant. Nor was the plaintiff bound to produce voluntarily these books and records, although it might have been compelled to do so by proper process.

At the argument before us the plaintiff contended that it was entitled to recover from the defendant both the damages which it has sustained from the defendant's wrongful use of its trade name and the amount of the profits realized by the defendant therefrom. We agree that the plaintiff is so entitled, so far as this may be necessary for its full compensation. *Regis* v. *H. A. Jaynes & Co.* 191 Mass. 245, 250. *Forster Manuf. Co.* v. *Cutter-Tower Co.* 211 Mass. 219, 223. But this does not mean that the plaintiff may recover from the defendant both the amount of the latter's profits as such and also damages assessed upon the theory that the plaintiff, but for the defendant's wrongful acts, would have made the sales which have been made by the defendant, and so is entitled to recover an additional amount for the profits which it has lost. It may not recover a double compensation for the same sales. The plaintiff is not to derive a double gain from the defendant's sales, by recovering in addition to the profits made by the defendant from its sales those which by reason of the same sales the plaintiff has lost the opportunity of making. This would be a manifest injustice. The plaintiff in such a case as this may to be sure have suffered some particular loss or damage for which the receipt of the defendant's profits would not compensate him. If, for example, the defendant has attempted to undersell him, has introduced what sometimes is called a "cut-throat competition," thus cutting down the plaintiff's profits without correspondingly increasing his own, or if the defendant has cheapened his production by the use of inferior

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materials or by unsuitable processes of manufacture, and thus has depreciated the value of the plaintiff's trade name or of the words or symbols to which the plaintiff has acquired a right, or otherwise has injured the reputation of the plaintiff's goods and thereby caused an appreciable loss to the maker, in addition to that caused by the actual sales which the defendant has made, the plaintiff should be allowed to recover for such a loss besides taking the defendant's profits, if the plaintiff has claimed and is allowed such profits. And this plaintiff appears to have suffered substantial damages, exceeding the defendant's profits. But these damages as assessed include the profits which the plaintiff would have realized, if it had made, with certain exceptions, all the sales of infringing goods that were made by the defendant. See *L. Martin & Co.* v. *L. Martin & Wilckes Co.* 5 Buch. 257, 260, *et seq.* It follows that the plaintiff may recover only the amount of damages and the amount of the defendant's profits on the excepted sales, being the additional sum of $195.93, with interest. The result is that none of the defendant's exceptions to the master's report which have been argued can be sustained; but the final decree appealed from must be modified, as in *Nelson* v. *J. H. Winchell & Co.* 203 Mass. 75, 93, by deducting therefrom the allowance of $311.59 to the plaintiff with interest thereon; and the decree so modified must be affirmed.

So ordered.

RAYMOND SYNDICATE *vs.* AMERICAN EXPRESS COMPANY.

Suffolk. March 25, 1913. — May 24, 1913.

Present: RUGG, C. J., MORTON, LORING, SHELDON, & DE COURCY, JJ.

Negligence, In use of "green horse." *Animal.* *Evidence*, Matters of common knowledge, Presumptions and burden of proof. *Words*, "Green horse."

If an express company permits a "green horse," which it has owned only for three days and about whose disposition and training it knows nothing, to be driven through one of the busiest parts of a large city where upon meeting an electric car it shies across a sidewalk and breaks a shop window, these facts are evidence of negligence on the part of the express company, on which it can be found to be liable to the proprietor of the shop for the damage caused by the breaking of the window.

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In an action for damages caused by the shying of a horse, which the defendant had bought three days before the accident as a "green horse," the jury may assume as a matter of common knowledge that a "green horse" is one understood to be fresh from the country and entirely unwonted to the distracting conditions of the business streets of a great city.

TORT, by the tenant of a store numbered 90 on Washington Street in Boston against a corporation carrying on a large express business, for alleged negligence of the defendant in breaking a plate glass window in the premises occupied by the plaintiff, by means of a horse attached to an express wagon of the defendant who shied across the sidewalk into the window on November 14, 1910, thereby causing loss and damage to the plaintiff. Writ in the Municipal Court of the City of Boston dated December 23, 1910.

On appeal to the Superior Court the case was tried before *Bell*, J. The undisputed facts shown by the plaintiff's evidence are stated in the opinion.

The answers of the defendant's assistant general manager to interrogatories filed by the plaintiff, after stating that the horse in question on November 14, 1910, the date of the accident, was driven by one Carney who had been in the defendant's employ for more than nine years, contained the following statement: "The horse was purchased November 11, 1910, from H. S. Harris Sons, Boston, Mass., and the horse Carney was driving that morning was a green horse, so called; that the horse Carney was then driving had no shoes on its hind feet; that it was not its custom to shoe horses until after they had been worked two or three days."

The defendant offered no evidence and asked the judge to order a verdict for the defendant. The judge refused to do this, and submitted the case to the jury. A part of the judge's charge was as follows: "I am leaving it to you as a question of fact, as men living in this vicinity with a knowledge of affairs, to say whether or not in your judgment it was negligence on the part of the defendant to put a horse bought as this one was, to put it into the streets of Boston before they knew whether the horse was reasonably accustomed to cars and would not shy and do harm. That is the question. According to your experience of men, according to your knowledge and experience of men,

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was the defendant negligent in putting a horse bought as this horse was, knowing about it what they did know, much or little, on the streets of Boston where it would meet electric cars, until they knew by test or inquiry that that horse was a safe horse to drive on the streets where there were electric cars. If you find that it was a negligent thing to do, according to your knowledge, then you are of the opinion that this act, sending this horse out that morning, might have been a negligent one."

At the close of the charge the defendant excepted "to that part of the charge that there is evidence of negligence."

The jury returned a verdict for the plaintiff in the sum of $50; and the defendant alleged exceptions.

A. M. Pinkham, for the defendant.

C. F. Eldredge, for the plaintiff.

RUGG, C. J. This is an action of tort to recover damages alleged to have been caused by the negligence of the defendant. The undisputed facts showed that the defendant sent a "green horse," which it had owned three days, through one of the busiest parts of Boston in charge of a competent driver without any knowledge or making any effort to ascertain whether the horse was used to the sounds and sights of a great city. At the noise of the first electric car the horse shied and broke a plate glass window of the plaintiff.

The question of the defendant's negligence rightly was submitted to the jury. The jury as men of common experience might have inferred that a green horse was one understood to be fresh from the country and entirely unwonted to the distracting conditions of Boston streets, and that the responsible agents of the defendant knew this. To take out such a horse for its first journey under the circumstances here disclosed might have been found to have been wanting in due care.

Exceptions overruled.

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JOHN H. GRAY vs. BOSTON ELEVATED RAILWAY COMPANY.

Middlesex. March 25, 1913. — May 24, 1913.

Present: RUGG, C. J., MORTON, LORING, SHELDON, & DE COURCY, JJ.

Damages, In tort. *Evidence*, *Res inter alios*, Opinion, *Res gestæ*, Public record, Presumptions and burden of proof. *Insurance*, Accident. *Negligence*, Street railway. *Practice*, *Civil*, New trial. *Jury and Jurors*.

In an action of tort for personal injuries sustained by a professor of economics and political science of a State university, the plaintiff properly may be allowed upon the question of damages to show the extent of his studies and his special equipment in his department of learning, his skill and experience having some bearing upon the value of his time, and he also may be allowed to show that five months before his injury he had entered into a profitable contract for the preparation of a series of articles on "Economics of Advertising" which he had planned to write during his summer vacation and that he was prevented by his injury from doing this; the plaintiff, if he prevails, being entitled to recover damages not only for the pain and suffering that he endured but also for the loss of time, of the valuable use of which he was deprived.

In an action of tort for personal injuries the defendant should not be allowed to show in reduction of damages that the plaintiff received money under a policy of accident insurance by reason of his injuries, the transactions between an insurance company and the plaintiff having no bearing on the extent of his injuries nor upon the defendant's liability for them.

In an action against a corporation operating a street railway for personal injuries caused by the plaintiff falling or being thrown from a car of the defendant, it is proper for the presiding judge to exclude testimony, offered by the defendant, of a witness who did not see the accident, that while the plaintiff was being picked up after his injury the witness heard some noise and heard somebody say, "It was his own fault," this being merely hearsay evidence of the expression of an opinion by an unknown person, and not a part of the *res gestæ*.

In an action for personal injuries against a corporation operating a street railway in a city, the defendant contended that the street where the accident occurred was slippery, and a foreman of the street department of the city, being called as a witness by the defendant, testified that the street had been oiled recently and gave the date of the oiling after refreshing his recollection from a record which the witness filed every morning after the oiling. This record then was offered in evidence and was excluded by the judge. *Held*, that the exclusion was right, as it did not appear that the writing was anything more than a memorandum made by the witness for the information of his superiors.

In an action of tort for personal injuries, it is proper for the presiding judge to instruct the jury upon the question of damages, that if "the plaintiff in an honest effort to lessen the injurious effects of the accident used due care in applying for treatment of the wound on his knee to a reputable physician, the defendant is responsible in damages for the injuries that resulted to the plaintiff from

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the defendant's negligence, even though such injuries were aggravated by an accidental or mistaken, but honest, treatment on the part of said physician."

In an action of tort for personal injuries, sustained by a professor of economics and political science of a State university, where the plaintiff seeks to recover damages for his loss of valuable time as well as for his sufferings, it is proper for the presiding judge to instruct the jury to the effect that in determining the amount of damages the jury may consider the amount of the plaintiff's "average earnings, his professional reputation and his special attainments in his profession."

It is proper for a judge presiding at a trial to refuse a request for an instruction to the jury, that where "witnesses of equal candor, fairness and intelligence testify with equal opportunity of knowledge and memory, and their testimony is in all respects of equal weight and credibility and there is a conflict as to facts which cannot be reconciled, the number of witnesses then constitutes a preponderance and the verdict should be in harmony with the greater number of witnesses," if such a ruling is inapplicable to the facts because the witnesses did not have an equal opportunity of observation.

If a street railway car, after stopping at a regular stopping place to enable a passenger to alight, starts suddenly when the passenger is in the act of alighting and the passenger is injured, these facts, unexplained, are evidence of negligence on the part of either the conductor or the motorman of the car.

In an action against a corporation operating a street railway for personal injuries sustained when alighting as a passenger from a car of the defendant, after a verdict for the plaintiff, the defendant made a motion for a new trial on the ground of the alleged disqualification of a juror. It appeared that one of the jury, more than six years before the trial, was injured in a collision with a car of the defendant and presented a claim for damages to the defendant; that no settlement of the claim was made and no action was brought; that before the jury were impanelled the clerk of court asked, among other things, whether any of the jurors had a claim against the defendant, and no one responded; and that no motion was made under R. L. c. 176, § 28, or otherwise, for the examination under oath of any juror; that at the time of the trial all the facts in regard to the juror's claim against the defendant were known to the defendant through its accident records, although not known to its attorney who tried the case. The trial judge found that there was no bias or prejudice on the part of the juror and denied the motion for a new trial. *Held*, that there was no disqualification of the juror as matter of law and no ground for disturbing the action of the trial judge in denying the motion for a new trial.

TORT, by a professor at the head of the department of economics and political science at the University of Minnesota, for personal injuries sustained on the evening of June 27, 1911, on Huron Avenue near the corner of Sparks Street in Cambridge, alleged to have been caused by the sudden starting of an open street railway car of the defendant when the plaintiff was alighting therefrom after the car had come to a full stop at a regular stopping place in response to a request of the plaintiff. Writ dated August 11, 1911.

In the Superior Court the case was tried before *Keating*, J.

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The judge refused to make certain rulings requested by the defendant as stated in the opinion. The fourteenth ruling requested by the defendant, referred to in the opinion, was as follows: "14. The plaintiff having alleged that the injury was the fault of the defendant, must prove it. If he does not, he cannot recover. The plaintiff must show that any signal to start the car was given by the conductor, or that the car was started by the motorman without signal. This must be shown in evidence. The plaintiff cannot recover by showing that the car started and nothing more. Unless evidence is given of negligent starting, the jury must find for the defendant." The judge refused to make this ruling in the form requested but made it in the following modified form: "The plaintiff must show that a signal to start the car was given by the conductor or that the car was started by the motorman without signal, but if you believe the testimony introduced by the plaintiff you will be warranted in finding either that a signal to start was given by the conductor or that the motorman started the car without receiving a signal."

The jury returned a verdict for the plaintiff in the sum of $1,690. The defendant filed a motion for a new trial on the ground stated in the opinion, which was denied by the judge. The defendant alleged exceptions, raising the questions which are stated in the opinion.

The case was submitted on briefs.

W. R. Evans, Jr., for the defendant.

F. G. Cook & G. H. Hull, for the plaintiff.

RUGG, C. J. This is an action of tort in which the plaintiff seeks to recover damages for injuries received by him while a passenger of the defendant. The question of liability hinges upon the point whether the plaintiff, having given the conductor the proper signal, attempted to alight from the car before it came to a stop, or whether, after the car had stopped in response to his signal, it started again before he had a chance to reach a place of safety on the ground.

1. The plaintiff was rightly permitted to show the extent of his studies and his special equipment in the department of learning in which he specialized. His skill and experience had some bearing upon the value of his time.

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2. There was evidence tending to show that the plaintiff was a professor of economics in the University of Minnesota, that he had made a special study of public service corporations and had acquired a considerable reputation in that branch of political science. Against the exception of the defendant, he was allowed to show that in January before his injury, which occurred in June, he entered into a profitable contract for the preparation of a series of articles on "Economics of Advertising," and that he was prevented from executing this contract during the summer vacation as he had planned, because of the injury. The contract and the evidence respecting it were competent. The plaintiff was entitled to recover as damages compensation not only for the pain and suffering endured, but also for the loss of time of the valuable use of which he was deprived. The contract price for writing the articles was not recoverable specifically. It was admissible as bearing upon the general damages sustained by him. *Sibley* v. *Nason*, 196 Mass. 125, 131. Failure to write the articles was not too remote. It might have been found as to the plaintiff to have been a direct and immediate result of the injury. *Ballou* v. *Farnum*, 11 Allen, 73. *Halloran* v. *New York, New Haven, & Hartford Railroad*, 211 Mass. 132. *Randall* v. *Peerless Motor Car Co.* 212 Mass. 352, and cases cited at 381.

3. Evidence to show that the plaintiff received money under a policy of accident insurance properly was excluded. The relations between an insurance company and the plaintiff as its insured had no bearing upon the extent of his injuries, nor upon the defendant's liability. *Clark* v. *Wilson*, 103 Mass. 219. *International Trust Co.* v. *Boardman*, 149 Mass. 158.

4. There was evidence that the plaintiff was thrown or fell from the car to the street. The defendant offered to show that, while the plaintiff was being picked up, some one who was not a witness to the accident would testify that she heard some noise and somebody said, "It was his own fault." This evidence was excluded rightly. It was the expression of a conclusion or of an opinion, and not the exclamation of an observation. It was not a statement accompanying an act, nor was it a part of the controversy which was under investigation. The case is plainly distinguishable from *Hartnett* v. *McMahan*, 168 Mass. 3, on which the defendant relies.

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5. As tending to prove that the street was slippery, the defendant called a foreman of the street department to show that the street where the accident occurred recently had been oiled. The witness testified to the fact and date of oiling after refreshing his recollection from a record which was filed every morning after the oiling. This record was then offered in evidence and was excluded. In this there was no error. It does not appear that the writing had any force beyond that of a memorandum made by the witness himself for the information of his superiors. The witness was allowed to make the fullest use of it for the purpose of aiding him in giving his testimony, and it does not appear that the paper was competent for any purpose. *Gurley* v. *Springfield Street Railway*, 206 Mass. 534.

6. The instruction to the jury to the effect that if "the plaintiff in an honest effort to lessen the injurious effects of the accident used due care in applying for treatment of the wound on his knee to a reputable physician, the defendant is responsible in damages for the injuries that resulted to the plaintiff from the defendant's negligence, even though such injuries were aggravated by an accidental or mistaken, but honest, treatment on the part of said physician," was not error. This is in substance the rule which has been laid down in our own cases. *Eastman* v. *Sanborn*, 3 Allen, 594. *McGarrahan* v. *New York, New Haven, & Hartford Railroad*, 171 Mass. 211. *Hunt* v. *Boston Terminal Co.* 212 Mass. 99. It prevails generally.* The ground for the rule is that the plaintiff is bound to exercise reasonable care for his own safety after the injury. If the injury is serious enough to require the attendance of a physician, he is bound to use the caution of the ordinarily prudent person in choosing the physician and in following his instructions. If an honest mistake is made by a doctor wisely selected, that is regarded as one of the incidents of the tortious act of the defendant. The injured person cannot with justice be required to insure for himself the most skilful medical attendance. Lack of skill on the part of a physician so chosen is not

* *Reed* v. *Detroit*, 108 Mich. 224. *Lyons* v. *Erie Railway*, 57 N. Y. 489. *Loeser* v. *Humphrey*, 41 Ohio St. 378. *Selleck* v. *Janesville*, 100 Wis. 157. *Chicago City Railway* v. *Saxby*, 213 Ill. 274. *Seeton* v. *Dunbarton*, 73 N. H. 134. *O'Donnell* v. *Rhode Island Co.* 28 R. I. 245. *Hooper* v. *Bacon*, 101 Maine, 533. *Fields* v. *Mankato Electric Traction Co.* 116 Minn. 218.

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an independent and disconnected act, but is one which rationally may be attributed to the original tort of the defendant. The case at bar is distinguishable from *Snow* v. *New York, New Haven, & Hartford Railroad,* 185 Mass. 321, and cases of like nature.

7. The instruction to the effect that in determining the amount of damages the jury might consider the amount of the plaintiff's "average earnings, his professional reputation and his special attainments in his profession" was not open to criticism. It was competent as bearing upon earning capacity to consider what his professional attainments and reputation were. They were not independent elements for the assessment of damage, and the portion of the charge excepted to did not treat them as such. *Stynes* v. *Boston Elevated Railway,* 206 Mass. 75.

8. The defendant's tenth request, to the effect that there could be no recovery if the plaintiff's injury "was the result of an accident which occurred without the negligence of the defendant," was given in substance.

9. The request for a ruling to the effect that where "witnesses of equal candor, fairness and intelligence testify with equal opportunity of knowledge and memory, and their testimony is in all respects of equal weight and credibility and there is a conflict as to facts which cannot be reconciled, the number of witnesses then constitutes a preponderance and the verdict should be in harmony with the greater number of witnesses," although taken in substance from the opinion in *Madden* v. *Saylor Coal Co.* 133 Iowa, 699, was refused properly under the circumstances of this case. It was not applicable to the facts for the reason that the witnesses did not have equal opportunity for observation. The number of witnesses testifying in general to the same effect is an important factor to be taken into account by the jury, but other circumstances affecting the weight to be given to testimony are to be considered also. See *Beckles* v. *Boston Elevated Railway,* 214 Mass 311.

10. The defendant's fourteenth request was incorrect in its original statement, but, as modified by the trial judge, stated the law rightly as adapted to the evidence. *McDermott* v. *Boston Elevated Railway,* 208 Mass. 104.

11. The general request to the effect that the plaintiff was not

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entitled to recover was denied rightly. *Killam* v. *Wellesley & Boston Street Railway*, 214 Mass. 283.

12. The refusal of the judge to instruct the jury to disregard in considering damages the fact that the plaintiff was unable to keep his contract to write the magazine articles, was correct. As we have pointed out, this may have been regarded as a direct consequence of the injury. The physicial injury and its resulting pain may have been found sufficient to prevent the intellectual effort required to write the articles. As was said by Mr. Justice Holmes in *Braithwaite* v. *Hall*, 168 Mass. 38, 40, "To this extent a tortfeasor takes the risk of the value of what he destroys."

13. After the verdict a motion for a new trial was filed, one ground of which was the disqualification of a juror named Pfaff. Affidavits were filed and a hearing had, upon which the trial judge found as facts that Pfaff, in October, 1906,* suffered injury in his property through a collision between a wagon belonging to him and a car of the defendant, for which he presented a claim to the defendant; that no settlement was made and no action brought; that before the trial of the case at bar, but after the panel appeared to be complete, the clerk inquired among other things whether any of the jurors had a claim against the defendant, and that no one responded; that at no time was any motion made under R. L. c. 176, § 28, or otherwise, for the examination under oath of any juror; that all the facts respecting the juror's claim against the defendant were known to the defendant through its accident records although not to its attorney who tried the case, and that "neither by reason of the said accident and claim or otherwise was the said Pfaff in any way related to either party in said cause, nor did the said Pfaff have any interest therein, nor has he expressed or formed any opinion or been sensible of any bias or prejudice therein ; that there was no reason or objection to his serving as said juror in said case." After making these findings the judge overruled the motion for a new trial. These findings of fact must be taken as true. It cannot be said as matter of law that one who has against a party to an action a stale claim barred by the statute of limitations, the existence of which was within the knowledge of the objecting party, constitutes such a

* The trial of the present case was in January, 1913.

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disqualification of a juror as requires a new trial. The motion for a new trial in the absence of evidence constituting bias or prejudice as matter of law is ordinarily within the discretion of the trial judge. *Woodward* v. *Dean*, 113 Mass. 297. *Commonwealth* v. *Wong Chung*, 186 Mass. 231. That the circumstances relied upon as creating a bias were within the knowledge of the defendant before the trial has been said to be decisive against granting a new trial. *Wassum* v. *Feeney*, 121 Mass. 93. Failure to exercise the right to have the jurors examined before trial under the statute has been held to deprive a party of exception to a refusal to set aside the verdict for a cause which would have been revealed by such examination. *Smith* v. *Earle*, 118 Mass. 531.

14. No error is disclosed in the refusal to grant the requests for instructions presented by the defendant on its motion for a new trial. The juror was not so incapacitated as a matter of law as to render the verdict a nullity. His own testimony as to his own impartiality was a circumstance to be considered by the trial judge, with all the other evidence, in determining the fact.

Exceptions overruled.

EDITH G. MITCHELL *vs.* CITY OF BOSTON.

Suffolk. March 28, 1913. — May 24, 1913.

Present: RUGG, C. J., MORTON, LORING, SHELDON, & DE COURCY, JJ.

Way, Public: damages from alteration of highway. *Damages*, For property taken or injured under statutory authority. *Practice, Civil*, Conduct of trial: rebuttal.

Under R. L. c. 48, § 15, which provides that in estimating the damages to property of a person by the alteration of a highway "regard shall be had to all the damages done to him, whether by taking his property or by injuring it in any manner and there shall be deducted the benefit accruing to such property thereby," a petitioner for damages is required to show that the damages to his property exceed the benefits; and at the trial of such a petition, where the respondent in defense has introduced evidence of benefits to the petitioner's property, it is within the discretionary power of the presiding judge to refuse to allow the petitioner to introduce evidence in rebuttal bearing upon such benefits and tending to diminish their value.

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PETITION, filed in the Superior Court on January 1, 1912, for the assessment of damages alleged to have been caused to real estate of the petitioner on Railroad Street at the corner of Willow Street in that part of Boston called West Roxbury by the reconstruction and change of grade of Railroad Street.

The case was tried before *Wait*, J. The course of the trial is described in the opinion. The evidence offered in rebuttal, which was excluded by the judge as stated in the opinion, was the testimony of a real estate expert in regard to which the counsel for the petitioner stated that he wished to produce him as an expert on matters gone into by a witness for the defense "as to the benefit to the property," and further said, "Benefit is a part of the defense. I want his evidence to meet that."

The jury returned a verdict for the respondent; and the petitioner alleged exceptions.

The case was submitted on briefs.

H. R. Morse & W. M. Noble, for the petitioner.

G. A. Flynn, for the respondent.

RUGG, C. J. This is a petition for the assessment of damages caused to real estate of the petitioner by the widening, reconstruction and raising of the grade of a public way. No betterments were assessed. The language of the governing statute (R. L. c. 48, § 15) is: "In estimating the damage to property of a person by the laying out, relocation, alteration or discontinuance of a highway, or by an order for specific repairs, regard shall be had to all the damages done to him, whether by taking his property or by injuring it in any manner and there shall be deducted the benefit accruing to such property thereby."

The petitioner in putting in her case introduced no expert evidence as to the difference in the market value of her property before and after the street changes, but offered evidence tending to show the most reasonable method of correcting the injury to her estate caused by the elevation in the grade of the street, and evidence as to the diminution of the market value of her property arising from the acts of the respondent, and rested.

The evidence of the respondent tended to show that the petitioner's estate had been benefited in some aspects by its acts in the premises, and that the net result of the particular benefits set off against the injury was that the estate was as valuable as

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it was before the acts complained of. The petitioner in reply sought to introduce evidence bearing upon the benefit to her estate. Her exception to the refusal of the Superior Court to admit this evidence brings the case here. Her contention is that benefit is a defense and hence open to contradiction by way of reply. This position is not sound. The damage to which a petitioner is entitled in cases of this sort is a sum of money which will compensate her and make her as rich as, but not richer than, she was before the act of changing the street. An estimate of such compensatory sum can be made ordinarily only by finding the difference in the value of the estate before and its value after the street changes. Consideration of the benefits conferred is as essential an element in ascertaining compensation as consideration of the injury caused. Both must be taken into account and weighed the one against the other before the right result can be reached. It follows that it was a part of the petitioner's case in chief to offer her evidence touching the benefits accruing as well as the injury suffered. Having failed to proffer such evidence before resting, it was discretionary with the trial judge whether she should be permitted to introduce it for the first time in reply to the defense.

Exceptions overruled.

FRANK K. STEARNS *vs.* DENNIS A. LONG.

Middlesex. March 13, 1913. — May 28, 1913.

Present: RUGG, C. J., HAMMOND, LORING, SHELDON, & DE COURCY, JJ.

Res Judicata. Evidence, Of truth of alleged libel, Of character and reputation. *Practice, Civil,* Exceptions. *Libel and Slander,* Evidence of plaintiff's good character.

In an action for libel brought by the chairman of the licensing board of a city appointed under R. L. c. 100 against the publisher of a newspaper, alleging libellous statements that the plaintiff and his associates on the board had been lax in the enforcement of the law relating to sales of intoxicating liquors by innkeepers, a report in writing, made to the board of which the plaintiff was a member by police officers appointed by the board to investigate sales of intoxicating liquors by licensed innkeepers on Sundays and holidays, stating violations of the law by various innkeepers, is admissible in behalf of the de-

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fendant as tending to show the truth of the statements contained in the alleged libel, although upon the same report as evidence the Superior Court on a review under R. L. c. 100, § 4, reversed a decision of the mayor of the city removing the members of the board and found that the plaintiff was not guilty of any violation of law, the doctrine of *res judicata* not being applicable to this decision made upon a different issue and between different parties.

No exception lies to the admission of a preliminary question to a witness which has not harmed the excepting party.

In an action for libel brought by the chairman of the licensing board of a city against the publisher of a newspaper, alleging libellous statements that the plaintiff and his associates on the board had failed to enforce the law relating to sales of intoxicating liquors, it was *held*, that, even assuming that in this Commonwealth, where the defendant in an action for libel under a plea of justification asserts and undertakes to prove that the plaintiff was guilty of acts punishable as crimes, the plaintiff may rebut such proof by evidence of good character and reputation, which is an open question, yet in the present case the language used by the defendant did not impute any act punishable criminally, and that accordingly evidence of the plaintiff's reputation for good character was excluded properly upon the issue of liability, it having been made immaterial upon the question of damages by a verdict for the defendant. Moreover in the present case the offer of proof was too broad, not being confined to reputation as to those traits of character involved in the imputed wrongdoing.

TORT for alleged libels published on certain days from June 3, 1909, to March 20, 1910, in the Lowell Sunday Telegram, a weekly newspaper published in Lowell of which the defendant was the proprietor and publisher, of and concerning the plaintiff, who was chairman of the board of police or licensing board of the city of Lowell appointed by the mayor under R. L. c. 100, the general character of the alleged libels being to charge the plaintiff with a violation of his duty in failing to enforce the statutes relating to sales of intoxicating liquors. Writ dated December 13, 1910.

In the Superior Court the case was tried before *Stevens*, J. It appeared that on March 17, 1909, the mayor of the city of Lowell filed numerous charges against the board of police for malfeasance, incapacity and neglect of duty; that the hearings were held before the mayor and occupied forty-two days; and that the mayor found all the commissioners guilty of all the charges and deposed them from office. The commissioners applied to the Superior Court under R. L. c. 100, § 4, for a review of the charges, of the evidence submitted thereunder, and the findings thereon by the mayor. The application for a review was heard by *Dana*, J., who after a full hearing found the commissioners

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not guilty on all the charges preferred and restored them to office. They returned to office in the month of October, 1909, after a suspension of about three months.

The publication of the articles alleged by the plaintiff to be libellous was admitted.

The defendant by his evidence sought to establish the truth of the charges and in proof of his defense offered to read to the court and jury certain written reports made to the board of police by police officers who had been specially appointed by the board to visit the hotels on Sundays and holidays and made minutes of the number of people present eating and drinking in the various hotels and the kind of food and drink that they ordered and of how many customers came in within a certain time and how many went out. The defendant offered this evidence as bearing on the question whether the hotels were run and conducted on Sundays and holidays according to the provisions of the statutes. It appeared that this was one of the issues which was tried at the hearing before the mayor of the charges against the commissioners, including the plaintiff, and that the evidence offered was the evidence which had been offered at the hearing before the mayor. On this point and evidence the mayor had found the plaintiffs guilty of the charges, but *Dana*, J., upon the review had reversed the finding and found them not guilty upon the same point and upon the same evidence. The plaintiff objected to the introduction of this evidence only on the ground that the Superior Court, the court of last resort in the matter, had found the plaintiff not guilty of any violation of the law on this point and on this evidence, and that the question could not be retried in this case. The evidence was admitted, and the plaintiff excepted.

The exception to the question asked the witness Craig is explained sufficiently in the opinion.

The judge excluded the evidence offered by the plaintiff as to his character and reputation, which is mentioned in the opinion, and the plaintiff excepted. The plaintiff contended that some of the alleged libels, of which copies were annexed to the declaration, embraced charges against the plaintiff of crime or misdemeanor and that this made the evidence of his character and reputation admissible.

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The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

W. H. Bent, for the plaintiff.

J. J. Pickman, (*D. J. Murphy* with him,) for the defendant.

DE COURCY, J. Two of the exceptions taken by the plaintiff relate to the admission of evidence and may be disposed of briefly. The written reports made to the board of police, of which the plaintiff was a member, by police officers especially appointed by the board to investigate the sale of intoxicating liquor in licensed hotels on Sundays and holidays, were competent evidence. They tended to show violations of the law by the various innkeepers, and hence that the alleged libellous statements that the plaintiff and his associates on the board had been lax in the enforcement of the law relative to the sales of intoxicating liquors by innholders, were true in substance. *Conner* v. *Standard Publishing Co.* 183 Mass. 474. The ground of the plaintiff's objection was that the judge of the Superior Court on this evidence had found the plaintiff not guilty of any violation of law. But as the issue and the parties were different, the doctrine of *res judicata* does not apply.

The question put to the witness Craig clearly was a preliminary one, namely, whether he made the statement referred to, not whether that statement was true; and it was so stated by the judge. This exception must be overruled.

At the close of the evidence of the defendant, the plaintiff made an offer of the testimony of witnesses as to his character and reputation in the community. This was offered not as bearing on damages but on the issue of liability, and in any event would be immaterial on the question of damages in this case, as the verdict was for the defendant. *Howland* v. *George F. Blake Manuf. Co.* 156 Mass. 543. In civil proceedings, the general rule is that such evidence is immaterial and hence inadmissible even though the cause of action is one for which a criminal prosecution might be brought. *Geary* v. *Stevenson*, 169 Mass. 23. *Colburn* v. *Marble*, 196 Mass. 376. In an action of libel or slander, in some States evidence of the plaintiff's reputation is admissible in chief, on the theory that his character is put in issue. 25 Cyc. 482, 514. It is assumed by the plaintiff in his argument that where the words charge a crime he may show his good character in rebuttal

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of evidence introduced by the defendant in justification; but that, we think, must be regarded as an open question in this Commonwealth. The case of *Harding* v. *Brooks*, 5 Pick. 244, is authority for the introduction of such evidence only on the issue of damages, and in cases where the charge sought to be proved is of a criminal act, as was pointed out by Knowlton, J., in *Howland* v. *George F. Blake Manuf. Co.* 156 Mass. 543, 569. And in the latter case it was decided only that, if reputation was admissible in an action for libel, the plaintiff had not brought himself within the rule limiting such evidence to cases in which the charge sought to be proved is of the commission of a crime as distinguished from a charge of lesser magnitude. See *Geary* v. *Stevenson*, 169 Mass. 23, 32. Even assuming, without deciding, that where the defendant under his plea of justification assumes the burden of proving that the plaintiff was guilty of acts punishable as crimes, the plaintiff may repel that proof by evidence of good character, nevertheless in the case at bar the trial judge rightly excluded the evidence offered. The language used by the defendant in the alleged defamatory publications, interpreted by the ordinary meaning of the words, does not seem to us to impute bribery or any other act that is punishable criminally. *Sillars* v. *Collier*, 151 Mass. 50. Furthermore, the offer of evidence was not confined, as it should have been, to those traits of character which the imputed wrongdoing involved. *Commonwealth* v. *De Vico*, 207 Mass. 251.

Exceptions overruled.

OLD COLONY TRUST COMPANY *vs.* MEDFIELD AND MEDWAY STREET RAILWAY COMPANY.

Suffolk. January 23, 1913. — May 31, 1913.

Present: RUGG, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Mortgage, Of personal property: recording. *Street Railway*. *Words*, "Date written in the mortgage."

The requirement of R. L. c. 198, § 1, that a mortgage of personal property must be recorded within fifteen days "from the date written in the mortgage" in order to be enforceable against a person other than the parties thereto unless

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the mortgaged property is delivered to and retained by the mortgagee, is satisfied as to an indenture between a street railway company and a trust company whereby the street railway company conveyed all its property, both real and personal, to the trust company to be held by it in mortgage to secure an issue of coupon bonds, if such indenture is recorded within fifteen days after the date stated in the attesting clause as that of its execution and acknowledgment by the street railway company, although in the caption of the instrument it is referred to as dated twenty-five days previous thereto, if other provisions of the instrument show that the date recited in the caption merely designated the date to be placed upon the bonds when issued.

A street railway company conveyed all of its property to a trust company in mortgage to secure an issue of bonds. Thereafter it hired all of the electric power used in the operation of its street railway from another street railway company under a contract in writing from which it appeared that there was no intention to charge the property with a lien. After the payments of interest on the bonds were three years in arrears, and the payments for power to the second street railway company were two years in arrears, the trustees sought by a suit in equity to foreclose the mortgage and a receiver was appointed. The second company proved its claim for the agreed compensation for power before the receiver, who allowed the claim but gave priority to the bondholders. It did not appear that the delay in instituting the foreclosure proceedings was for the purpose of benefiting the mortgagee by the claimant's expenditures. *Held*, that the bondholders were entitled to priority.

BILL IN EQUITY, filed in the Supreme Judicial Court on May 3, 1912, by the plaintiff as successor by merger under St. 1911, c. 128, of the Mercantile Trust Company, the trustee in a mortgage of real and personal property given to it by the defendant to secure an issue of bonds, seeking a foreclosure of the mortgage and the appointment of an operating receiver of the defendant's property.

Eugene H. Mather, Esquire, was appointed receiver and the bill was taken *pro confesso*.

The receiver filed a report as to claims of creditors of the defendant and allowed a claim of the Milford, Attleborough and Woonsocket Street Railway Company in the sum of $11,457.50 for electric power furnished to the defendant, but declared that the claim should be subject to the claim of the bondholders secured by the plaintiff's mortgage. The Milford, Attleborough and Woonsocket Street Railway Company objected to the allowance of the report as to that item. The facts being agreed upon, the case was reserved by *Morton*, J., for determination by the full court.

The material facts are stated in the opinion.

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H. S. Davis, (*R. H. Johnson*, with him,) for the plaintiff.

H. H. Fuller, for the defendant.

BRALEY, J. The defendant having made default in the payment of the semi-annual instalments of interest, the bill is brought by the plaintiff, who by force of the St. of 1911, c. 128, is the successor of the original trustee, for a foreclosure of the mortgage or indenture of trust by the railway company upon all its real and personal property as security for the payment of the bonds. A decree has been entered taking the bill for confessed as against the defendant, and no question is raised as to the regularity of the proceedings, or the right of the plaintiff to a foreclosure in accordance with the provisions of the mortgage, or that the defendant is insolvent. The receiver appointed to take possession of the property, operate the railway, and to receive and disburse the income and earnings derived therefrom as the court might direct, having filed his report allowing, subject to the mortgage, certain unsecured claims which have been presented and proved, the Milford, Attleborough and Woonsocket Street Railway Company, hereinafter referred to as the claimant, the amount of whose debt is undisputed, contends that the mortgage as to the personal property is invalid because it was not duly recorded, and that if the mortgage is held to be valid, its debt should be given precedence either for the entire amount, or by analogy with the period fixed for the semiannual payment of interest on the bonds, for so much as accrued within six months next preceding the filing of the bill. *Westinghouse Air Brake Co.* v. *Kansas City Southern Railway*, 137 Fed. Rep. 26, 40.

The R. L. c. 198, § 1, requires a mortgage of personal property to be recorded within fifteen days "from the date written in the mortgage" or it shall not be enforceable against a person other than the parties thereto, unless the property mortgaged has been delivered to or retained by the mortgagee. What do the words, "date written in the mortgage," mean? The original St. of 1874, c. 111, § 1, provided that such mortgage must be recorded "within fifteen days after the date thereof," and so in substance are the Pub. Sts. c. 192, § 1. It was held in *Shaughnessey* v. *Lewis*, 130 Mass. 355, that the word "date" should be considered as meaning the time when the instrument became effectual as the contract of the parties, namely, upon delivery, of which the time

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stated in the mortgage might be considered as evidence, even if it would not be conclusive. But presumably in consequence of this decision the St. of 1883, c. 73, enacted that "every mortgage of personal property shall be recorded within fifteen days from the date written in such mortgage," and this has since been the law.

The mortgage could not have been admitted to record in the registry of deeds without acknowledgment, even if by reason of the dual character of the mortgaged property it also must be entered upon the records of the town. R. L. c. 127, § 7; c. 198, § 1. Although the indenture or mortgage is referred to in the caption as dated July 2, 1900, the *in testimonium* clause and certificate of acknowledgment, where it is declared that the defendant's corporate seal is affixed and the instrument lawfully executed and acknowledged in its name and behalf by its president and treasurer, duly authorized by vote of the stockholders, bears date as of July 27, 1900. The instrument, while a mortgage, includes the terms of the contract, the performance of which is secured. The wording of the context, especially in Article II,* shows beyond conjecture that the time first named designated only the date of the bonds from which the periods when the semiannual interest should accrue and become payable were to be computed. It was the intention of the parties that the instrument, when properly executed, should constitute a mortgage, and until then it was not dated, nor did it become a lien upon the property. Having been recorded within fifteen days thereafter the mortgage is valid. *Orcutt* v. *Moore*, 134 Mass. 48, 52. *Drew*

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* Article II was entitled "Bonds," and was as follows:

"The bonds secured by these presents are dated July 2, 1900, shall not exceed one hundred thousand dollars ($100,000) in amount, are of the denomination of one thousand dollars ($1,000) each and numbered consecutively from one to one hundred inclusive, and bear interest at the rate of five per centum per annum, payable semi-annually, and are in substantially the form following: —

[Here followed the form of the bonds and coupons.]

"Upon the execution and recording of this mortgage the Trustee shall certify and deliver to the Treasurer of the Company, or his order, the bonds secured hereby to such an amount not exceeding one hundred thousand dollars ($100,000) as may be authorized by the Board of Railroad Commissioners."

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v. *Streeter*, 137 Mass. 460, 462. *Amerige* v. *Hussey*, 151 Mass. 300. *Berry* v. *Levitan*, 181 Mass. 73. *Harrison* v. *J. J. Warren Co.* 183 Mass. 123.

The defendant although chartered to construct, equip and operate a street railway, never installed an electrical plant, but from the time it began to do business the motive power has been furnished by the claimant. Under the terms of the contract the compensation was fixed at a daily rate, which the parties agree was reasonable, and the plaintiff concedes that the service rendered was necessary for the operation of the railway. Although for a time payments were regularly made, when the receiver was appointed they were in arrears for a period slightly in excess of two years.

The property for the purposes of our decision may be treated as if converted by sale and the proceeds held as a fund for distribution by the court. *Markey* v. *Langley*, 92 U. S. 142. The argument of counsel for the claimant is that the debt should be given priority over the bondholders, on the authority substantially of *Miltenberger* v. *Logansport Railway*, 106 U. S. 286. See also *Southern Railway* v. *Carnegie Steel Co.* 176 U. S. 257. It is unnecessary, however, to determine whether *Miltenberger* v. *Logansport Railway*, holding that a court of equity has power not only to appoint, but to authorize, a receiver of a railroad to hire money required for the management and preservation of the property, and to pay claims for materials, repairs, ticket and freight balances, some of which were contracted more than ninety days before his appointment, yet all of which were indispensable to the business of the road, and to order the receiver to pay such loans and claims before making payment of a valid first mortgage, overdue when the suit to foreclose was begun by a second mortgagee, has been limited by *Gregg* v. *Metropolitan Trust Co.* 197 U. S. 183, where a majority of the court decided that a claim for ties necessary to the preservation of a railroad, furnished six months previous to the appointment of a receiver, did not in the absence of special circumstances entitle the petitioner to a preference over a mortgage recorded before the contract for the ties was made. See also *Wallace* v. *Loomis*, 97 U. S. 146; *Union Trust Co.* v. *Souther*, 107 U. S. 591; *Union Trust Co.* v. *Illinois Midland Railway*, 117 U. S. 434. It is plain from the nature

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and terms of the contract that the parties at its inception had no intention to charge the property with a lien. *Pinch* v. *Anthony*, 8 Allen, 536. *Elmore* v. *Symonds*, 183 Mass. 321, 322. *Westall* v. *Wood*, 212 Mass. 540, 545. The service was performed in so far as appears on the general credit of the mortgagor, and apparently the power could have been discontinued at will if the payments which accrued daily were not made. The plaintiff's security would have been unimpaired if the claimant, being unable to collect, had sought to secure reimbursement by a second mortgage, or to enforce payment by attachment, of the same personalty. *Berry* v. *Levitan*, 181 Mass. 73. *Travis* v. *Bishop*, 13 Met. 304. R. L. c. 167, § 69. If, during the period in arrears, current earnings, with its knowledge and assent, had been diverted for the benefit of the plaintiff before necessary current indebtedness, to maintain the road in operation, had been paid, there might have been ground for contending that the security of the bondholders should be charged in equity with the restitution of the fund, where but for such diversion there would have been net earnings to which the equitable lien would have attached. *Coram* v. *Davis*, 209 Mass. 229, 246. *Burnham* v. *Bowen*, 111 U. S. 776. *St. Louis, Alton & Terre Haute Railroad* v. *Cleveland, Columbus, Cincinnati & Indianapolis Railway*, 125 U. S. 658. No interest, however, was paid on the bonds. Indeed the receipts were not sufficient even to meet running expenses. Nor can the delay to institute foreclosure proceedings, until nearly three years elapsed after the last instalment of interest had been met, create an equitable lien. The mortgage, even if the mortgagor remained in possession, still subsisted, and there is not even an intimation that with knowledge of the business relations of the mortgagor and the claimant, a foreclosure had been postponed so that the mortgagee might be benefited by the claimant's expenditure. *Mersick* v. *Hartford & West Hartford Horse Railroad*, 76 Conn. 11. *Fordyce* v. *Omaha, Kansas City & Eastern Railroad*, 145 Fed. Rep. 544, 556. The debt incurred doubtless tended to preserve temporarily the business and good will, upon the success of which the value of the bonds as an investment may largely have depended.

But if the broad doctrine which the claimant presses is given full recognition, it is difficult in the exercise of sound discretion to

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ascertain where the line of demarcation should be drawn, for the preservation of a street railway as a going business enterprise, as well as its safe and efficient operation, demands not merely the furnishing of motive power, but cars, rails, ties, and other essential equipment. *Lackawanna Iron & Coal Co.* v. *Farmers' Loan & Trust Co.* 176 U. S. 298, 316. *Gregg* v. *Metropolitan Trust Co.* 197 U. S. 183. While it is true that the plaintiff invokes the aid of a court of equity to enforce its security, it is also true that it comes as a mortgagee under a valid instrument. By the appointment of a receiver the court is not vested with a general authority to displace vested liens on the body of the property created by contract, and it is the exception and not the rule, that the priority of mortgage liens can be displaced in favor of unsecured general creditors. *Kneeland* v. *American Loan & Trust Co.* 136 U. S. 89, 98. *Thomas* v. *Western Car Co.* 149 U. S. 95, 111. *Lackawanna Iron & Coal Co.* v. *Farmers' Loan & Trust Co.* 176 U. S. 298, 316. The defendant had full authority to convey in mortgage its entire property and, as the mortgage had been recorded, the claimant, when it entered into the contract, did not act under any mistake or misapprehension as to the actual condition of the defendant's title, which it should not be permitted to overset even if the claim is meritorious. *Bullock* v. *Williams*, 16 Pick. 33, 35. *Allis-Chalmers Co.* v. *Central Trust Co.* 190 Fed. Rep. 700.

The debt, moreover, if the defendant had been declared an insolvent debtor, is not within the class entitled to a preference. The claimant under R. L. c. 163, § 118, would have ranked as an unsecured general creditor. The St. of 1897, c. 400, now R. L. c. 150, § 29, specifies the class of claims entitled to priority in the settlement of insolvent estates by receivers, which corresponds substantially with the preferences enumerated in R. L. c. 163, § 118, cl. 3–5. And the St. of 1898, c. 420, re-enacted in R. L. c. 167, § 126, further assimilated the effect of a receivership on the rights of creditors, with the operation of an assignment under R. L. c. 163, §§ 54, 55, by providing that an attachment four months old prior to filing the bill should be dissolved, unless the court ordered the action prosecuted for the benefit of the estate. It evidently was the intention of the Legislature to place upon a parity all unsecured debts owed by an insolvent debtor,

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whether the estate is administered by a court of insolvency, or by a court of equity through a receivership. *Waite* v. *Worcester Brewing Co.* 176 Mass. 283. Under these enactments, the admission to proof of alleged preferential debts ordinarily depends upon the inquiry, whether they come within the prescribed classification. When called upon to determine the rights of different classes of creditors entitled to participation in the distribution of assets of an insolvent corporation, a court of equity, even in the absence of statutory provisions expressly directing the order in which debts shall be ranked, will adopt and follow wherever practicable the rule prescribed by statute relating to the allowance of debts in insolvency or bankruptcy. *Jones* v. *Arena Publishing Co.* 171 Mass. 22, 29. *Franklin County National Bank* v. *First National Bank of Greenfield,* 138 Mass. 515, 518. Story Eq. Jur. (13th ed.) § 64. See bankruptcy act 1898, § 64, b. *In re Byrne,* 97 Fed. Rep. 762. We are not aware of any inherent power of this court which enables us to diminish the rights conferred on the mortgagee by the R. L. c. 198, § 1, or to sanction the allowance of preferences or priorities between a secured and unsecured creditor by taking them up where they were left by the requirements of our laws, and extending the right of participation further than the law permits. *Jones* v. *Arena Publishing Co.* 171 Mass. 22. *Sunter* v. *Sunter,* 190 Mass. 449, 455. *Metropolitan Trust Co.* v. *Tonawanda Valley & Cuba Railroad,* 103 N. Y. 245. *Magniac* v. *Thomson,* 15 How. 281, 299. *Hedges* v. *Dixon County,* 150 U. S. 182.

The report of the receiver should be confirmed.

Decree accordingly.

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SUSAN H. ALDRICH, executrix, *vs.* HENRY A. ALDRICH.

Suffolk. January 23, 1913. — June 2, 1913.

Present: RUGG, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Will, Validity, Revocation. *Undue Influence. Evidence*, Of undue influence, Remoteness, Admissions by conduct: failure to testify, Of state of mind, Presumptions and burden of proof. *Witness.*

At the trial, on appeal from a decree of the Probate Court allowing a will, of an issue, whether the will was procured by undue influence, it appeared that the appellee was the testator's wife by a second marriage, that the appellant was one of several children of the testator, all by his first marriage, that by the will the widow was given seven twelfths of the estate, a daughter of the testator five twelfths, and each of the rest of the children and of several grandchildren $5. The testator's first wife had died about a year before his second marriage, which was twelve years before the will was made. The testator died about five years after the will was made. The appellant offered evidence tending to show that his mother had stated to him in the presence of the testator and the appellee that she had caught them in illicit relations, and that the appellant thereupon ordered the appellee from the house. The evidence was excluded, subject to an exception by the appellant. The bill of exceptions did not set out all of the evidence, but stated that there was evidence tending to show the exercise of undue influence by the appellee over the testator and an especial hostility on her part toward the appellant beginning previous to the date of her marriage to the testator and continuing to the date of the testator's death. *Held*, that, while the evidence might have been admissible to show the state of the testator's mind if some foundation had been laid for it, it did not appear that such a foundation had been laid because there was no evidence of efforts by the appellee to induce the testator to disinherit the appellant and to make a will in her favor; and that the time to which the evidence related was so remote that its exclusion as a matter of discretion could not be deemed improper.

At the trial, on an appeal from a decree of the Probate Court allowing a will, of an issue, whether the will was procured by undue influence of the testator's widow, who was named as executrix, the widow, although a beneficiary under the will, is not an adverse party, and her failure to testify in support of the will is not evidence from which an inference can be drawn that, if she had testified, her testimony would have tended to prove the will invalid.

The mere fact of the disappearance of several instruments of a testamentary nature, which were executed by a testator after the making of a will which was offered for probate, in the absence of any contention that they had been taken from the testator's possession or were among his papers at his death, raises a presumption of fact that the testator destroyed them with an intention to revoke them.

At the trial of an issue, whether an instrument offered for probate as a will had been

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revoked, there was evidence that, during five years that intervened between the date of the instrument and the testator's death, the testator had executed several instruments of a testamentary nature, but whether or not they were wills or codicils, or what was their character, was left uncertain. None of them could be found. One of a firm of attorneys who had acted for the testator in drawing the various instruments testified, subject to an exception by a contestant of the will, that at the testator's request he went to him within three months before his death with the instrument offered for probate and stated to him that his, the attorney's, partner was under the impression that there was another will, that the testator, after a very careful examination of the will, stated, "No, this is the one, this is the one I want," and then laid the will down on the bed at his side, where the witness left it. *Held*, that the evidence was admissible as tending to show an intention of the testator to destroy the wills that could not be found and to revive, or to select, the will offered for probate.

APPEAL by Henry A. Aldrich from a decree of the Probate Court allowing the will of Charles T. Aldrich, late of Winthrop.

The will was dated June 17, 1902. By its provisions seven twelfths of the estate were given to the testator's widow, Susan H. Aldrich, five twelfths to Alice M. Aldrich, his daughter by a former marriage, and $5 to each of three sons by the former marriage, Henry A., Charles and Louis, and to an adopted daughter and to each of his grandchildren. The widow was appointed executrix.

The following issues were framed for the jury:

"1. Was the will purported to be executed by Charles T. Aldrich made through the fraud or undue influence of Susan H. Aldrich?

"2. Was the instrument now offered for probate revoked or cancelled by the testator?"

The issues were tried before *Rugg*, C. J. It appeared that the testator had married Susan H. Freeman in November, 1890, about a year after the death of his first wife, and that there were no children by the second marriage. The testator died on April 6, 1907.

The bill of exceptions states that there was evidence introduced by the appellant, which was controverted by the appellee, tending to show the exercise of undue influence by Susan H. Aldrich over the testator, and tending to show an especial hostility on her part against the appellant, beginning previous to the date of her marriage to the testator and continuing up to the date of the execution of the will of June 17, 1902, and from that time down to the date of the death of the testator.

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The appellant further offered to prove, for the purpose of showing that such hostility was not caused by any wrongful or improper conduct on his part, that, previous to the marriage of his father and the appellee and during the lifetime of his mother, there had been illicit relations between the testator and the appellee, and that upon one occasion he had gone home and found his father and mother and the appellee in the front hall; that his mother was crying, and that, upon his asking her what was the matter, she "stated that she had just caught his father and Sue Freeman having connections; that neither of them had denied it, and that he then ordered said Susan H. Freeman out of the house, and further ordered her to keep away in the future." The evidence was excluded and the appellant excepted.

Upon the second issue, Peter J. McLaughlin, one of the witnesses to the instrument offered for probate, testified, upon cross-examination, that upon several occasions subsequent to the date of the will here in question he had been called in to witness other wills of the testator; that he was unable to fix the date of the execution of any of such subsequent wills with the exception of the last one, which was in the late spring or early summer of 1906; that he was able to fix this date by reason of the fact that the testator had a good deal to say about the San Francisco earthquake, he having been in California at the time and having just returned from there. In redirect examination he testified that he was not sure that all the instruments witnessed by him were wills; that some of them might possibly have been codicils, though he did not think so.

There was no codicil to the will of June 17, 1902.

John A. Thayer, Esquire, who drew and was a witness to the will offered for probate, testified that he had drawn other wills for the testator than the one of June 17, 1902, but that he was unable to remember when these other wills had been drawn: that some of them might have been drawn subsequent to June 17, 1902. He further testified that in February, 1907, at the request of the testator, he had gone to the testator's safe deposit box in the Worcester Safe Deposit Company to get his will and that he found there only the will of June 17, 1902, in an unsealed envelope and that he delivered the will to Mr. Perry, his partner, to take to the testator.

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Mr. Perry was allowed, against the objection of the appellant, to testify as to an alleged declaration of the testator at the time he took the will of June 17. 1902, to the testator in February, 1907, in substance as follows: "I stated to Mr. Aldrich that I understood that the will had been sent for, and I had the will, and . . . said . . ., 'Mr. Thayer is under the impression that there is another or later will.' And Mr. Aldrich took the will and read it, . . . consuming considerable time in reading it, . . . opening the sheets . . . and my impression is he was at least as long about it to have read it twice, and he said, 'No, this is the one, this is the one I want,' and then laid the will down on the bed by his side. Then we talked about general matters." Mr. Perry further testified that he left this will with the testator.

The appellant asked that the jury be instructed as follows:

1. "In weighing the evidence upon the issue of undue influence, it is proper for you to consider the fact that Susan H. Aldrich, the person charged with the exercise of such undue influence, has not taken the stand to deny that she exercised such undue influence nor to deny the existence of a long standing hostility on her part against this respondent as testified to by said respondent, whose testimony stands uncontradicted."

2. "Under the statute of this Commonwealth no will shall be revoked except by burning, tearing, cancelling, or obliterating it with the intention of revoking it by the testator himself or by a person in his presence and by his direction; or by some other writing signed, attested, and subscribed in the same manner as a will; or by subsequent changes in the conditions and circumstances of the testator from which a revocation is implied by law."

3. "There is evidence in this case which is undisputed that a will later in date than the will here offered for probate was executed by the testator, and there is no evidence of any revocation of said later will in any of the methods prescribed by the statute governing the revocation of wills; and if you find that such a later will was executed, then your answer to the second issue here presented must be in the affirmative."

The requests were denied.

The jury answered the issues in the negative. The appellant alleged exceptions.

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W. J. Brown, for the appellant.

M. M. Taylor, (*C. B. Perry* with him,) for the appellee.

BRALEY, J. The testator, while he did not overlook his son, gave the appellant only a nominal pecuniary legacy. It was contended at the trial, that the will was procured through the undue influence of the executrix, the testator's wife by a second marriage, and he offered evidence, which was excluded, that in his presence some twelve years previous to the execution of the will, upon being charged by his mother, the first wife of the testator, with illicit relations, neither of the implicated parties denied their guilt. The will undoubtedly is largely beneficial to the widow, and if the jury believed this evidence a feeling of hostility on her part may have been engendered which if opportunity offered might have induced her to persuade the testator to discriminate unjustly against his son. A wife, however, lawfully may urge her husband to make a will in her favor, and the exceptions do not purport to recite all the evidence. It often happens that no direct proof of undue influence can be produced. It must be established by proof of circumstances. The evidence offered might have been admissible as tending to show the testator's mental status if some foundation had been laid. *Shailer* v. *Bumstead*, 99 Mass. 112, 121. But if subsequent expressions of hostility were introduced which continued to the date of the will, and the testator's death, no evidence appears of efforts on her part to induce him substantially to disinherit the appellant, and to make a will in her favor. The undisputed facts only showed the contents of the will, and that the executrix and principal legatee was the second wife of the testator, who married her in about a year after the death of his first wife and mother of his children. But of themselves these facts did not prove undue influence. *Maynard* v. *Tyler*, 168 Mass. 107, 114. The circumstances of each case are so varied that a rigid or uniform rule cannot be laid down, and how far evidence of this description should be admitted must be left very largely to the discretion of the presiding justice who has all the evidence before him. The period in the present case seems to have been so remote that the exclusion of the testimony cannot be deemed improper or unfounded. *Jenkins* v. *Weston*, 200 Mass. 488. *Howes* v. *Colburn*, 165 Mass. 385.

The person alleged to have exercised undue influence, even if

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a beneficiary, is not an adverse party, and such person may be called as a witness either by the executor or contestant, and the failure of the proponent although present during the trial, to give evidence in support of the will which she was required to offer for probate, or to deny the accusations of the appellant, did not convert her silence into an inference of fact to be drawn by the jury, that if she had testified her testimony would have been prejudicial to its validity. *Shailer* v. *Bumstead*, 99 Mass. 112, 127. *McConnell* v. *Wildes*, 153 Mass. 487. *Old Colony Trust Co.* v. *Wallace*, 212 Mass. 335. The instructions requested on this point were properly refused, and those given were unexceptionable so far as they went, although they well might have gone farther. *Jones* v. *Boston & Northern Street Railway*, 211 Mass. 552, 555.

It is declared by the testator in the beginning of the instrument, that it is his "last will and testament." But this is not conclusive, and the second issue presented the question whether it had not been revoked or cancelled by the testator. A will under the R. L. c. 135, § 8, cannot "be revoked except by burning, tearing, cancelling or obliterating it with the intention of revoking it by the testator himself or by a person in his presence and by his direction; or by some other writing signed, attested and subscribed in the same manner as a will; or by subsequent changes in the condition or circumstances of the testator from which a revocation is implied by law." It is only the clause, "signed, attested and subscribed in the same manner as a will," upon which the appellant relies. If revocation were shown, he was not required to prove the provisions of a later will which could not be offered for probate. *Wallis* v. *Wallis*, 114 Mass. 510. See *Tarbell* v. *Forbes*, 177 Mass. 238, 243; *Williams* v. *Williams*, 142 Mass. 515. It does not seem to have been disputed that subsequent wills were prepared under his direction and duly executed, although one of the witnesses who attested the instruments testified that some of them possibly might have been codicils, but from his recollection he thought they were wills. The making of a new will, if on its face it purports to be the testator's last will, operates to revoke all former wills without words of express revocation, and the intention to revoke and the act of revocation being coincident the statute is satisfied. *Laughton* v. *Atkins*, 1 Pick. 535. *Brown* v. *Thorndike*, 15 Pick. 388. It is not contended that any specific

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provision or clause had been revoked by later wills, but that the entire will had been nullified.

While the evidence appears to have been slight, the jury were properly instructed that they could find some of the subsequent instruments described by the witnesses might have been codicils, and if they so found, what effect, if any, codicils, the contents of which were not shown, should have, either as a modification or revocation of the original will, was left to their determination. The mere intention to revoke and nothing more, as we have said, does not of itself constitute a revocation. But as the later wills were not produced, and neither party claimed that the wills ever had been taken from the testator's possession or were in existence among his papers at his death, their disappearance raised a presumption of fact for the consideration of the jury, that with the intention to revoke he had destroyed them. *Davis* v. *Sigourney*, 8 Met. 487, 488. *Pickens* v. *Davis*, 134 Mass. 252, 257, 258. *Williams* v. *Williams*, 142 Mass. 515, 517. 40 Cyc. 1280, 1281, and cases cited.

The question whether, under these conditions, the declarations of the testator, to the admission of which the appellant excepted, were admissible is one where the cases are far from being uniform. The ground of exclusion is that the declarations are hearsay and nothing more. *In re Shelton*, 143 N. C. 218; 10 Am. & Eng. Ann. Cas. 531, note 535, 536, where many of the authorities are collected and compared. *Throckmorton* v. *Holt*, 180 U. S. 552, 586. But we are not prepared to qualify the carefully considered opinion of Mr. Justice Charles Allen, speaking for the court in *Pickens* v. *Davis*, 134 Mass. 252, which decides that such evidence is admissible to show the intention, state of mind, purpose or plan of the testator, and is in accordance with many well considered cases. *Spencer's appeal*, 77 Conn. 638. *Patterson* v. *Hickey*, 32 Ga. 156. *Burge* v. *Hamilton*, 72 Ga. 568, 625. *In re Page*, 118 Ill. 576. *McDonald* v. *McDonald*, 142 Ind. 55. *Collagan* v. *Burns*, 57 Maine, 449. *Lawyer* v. *Smith*, 8 Mich. 411. *Ewing* v. *McIntyre*, 141 Mich. 506, 517, 518. *Lane* v. *Hill*, 68 N. H. 275. *Collyer* v. *Collyer*, 110 N. Y. 481. *Behrens* v. *Behrens*, 47 Ohio St. 323. *Luis* v. *Muhrback*, 49 Ore. 452, 469, 470. *In re Steinke's Will*, 95 Wis. 121. *Boudinot* v. *Bradford*, 2 Dall. 266. *Fallon's estate*, 214 Penn. St. 584. *Colvin* v. *Fraser*, 2 Hagg. Eccl. 266.

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Reed v. *Harris*, 7 Car. & P. 330. *Keen* v. *Keen*, L. R. 3 P. & D. 105. The statements of the testator, identifying the earlier will as the one he wanted and which he had requested his counsel to procure, were competent evidence for the consideration of the jury as indicative of his intention or plan to destroy the wills which could not be found, and to revive, or to select, the will propounded as his final will. *Davis* v. *Sigourney*, 8 Met. 487, 488. *Pickens* v. *Davis*, 134 Mass. 252, 257, 258. *Williams* v. *Williams*, 142 Mass. 515, 517. *Lane* v. *Moore*, 151 Mass. 87, 89, 90. Wigmore on Ev. §§ 112, 1737.

The requests upon the question of revocation were sufficiently covered by the instructions. The burden of proof rested on the appellant, and if the jury were left in doubt it had not been sustained. *Giles* v. *Giles*, 204 Mass. 383. It was proper to charge accordingly, and the instructions upon this portion of the case, and the presumptions as to the testator's intention which they might draw from all the evidence, do not appear for the reasons stated to be open to the objections now urged.

Exceptions overruled.

THOMAS CALLAHAN *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 14, 1913. — June 2, 1913.

Present: RUGG, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON, & DE COURCY, JJ.

Negligence, Street railway, Compliance with municipal ordinances and regulations as proof of due care. *Evidence*, Competency, To explain absence of witness. *Witness*, Absent witness. *Practice, Civil*, Exceptions.

In an action against a street railway company by a passenger, where the plaintiff's evidence tends to show that, as he was in the act of alighting from a car of the defendant which was "slowing up" preparatory to coming to a stop at the farther crosswalk at an intersecting street, the car suddenly moved forward and he was thrown to the ground near the nearer crosswalk, the defendant, to show a reason for the car "slowing up" and for its not stopping in front of the intersecting street, may introduce in evidence a municipal ordinance and a regulation which required the car to be so operated.

At the trial of an action against a street railway company for personal injuries re-

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ceived by a passenger, a claim investigator employed by the defendant, who had stated in cross-examination that several persons, whose names were on a report of the accident made by the conductor of the car upon which the plaintiff was a passenger, had not been summoned as witnesses by the defendant, may be asked in redirect examination his reason for not summoning them and may state that they wrote to him stating that they knew nothing about the accident.

The burden is upon a party excepting to an erroneous ruling of a trial judge to make it manifest in his bill of exceptions that he was prejudiced by the error; and if the bill does not make it manifest that the error was to his prejudice, his exception will be overruled.

A trial judge erroneously omitted from his charge to the jury any instructions covering the plaintiff's contention. At the close of the charge, a colloquy took place at the bench, during which the judge made a statement which, if heard by the jury, would have cured his error. A bill of exceptions filed by the plaintiff stated that the judge's later statement was made "in the presence but not in the hearing of the jury." The bill afterwards was amended to state merely that the statement was made in a colloquy at the bench. The statement was taken down by a stenographer and bore the character of a statement to the jury. *Held*, that presumably the statement was heard by the jury, and, the bill not making manifest that it was not so heard, the plaintiff did not show that he was harmed by the error and the exception must be overruled.

TORT for personal injuries alleged to have been received on November 23, 1903, at about ten o'clock in the evening, and to have been caused by the plaintiff being thrown to the ground by the sudden moving forward of a street car of the defendant as he was in the act of alighting therefrom at Lauriat Avenue in that part of Boston called Dorchester. Writ dated July 20, 1907.

In the Superior Court the case was tried before *Bond*, J.

The facts which the plaintiff's evidence tended to prove are stated in the opinion. The plaintiff contended that he was thrown from the car by its suddenly starting ahead after it had slackened its speed and had nearly come to a stop. The plaintiff had testified at a former trial that the car had slowed up, and that he was thrown off on the in-town side of Lauriat Avenue. A witness for the defendant testified that the car had slowed up on the in-town side of Lauriat Avenue. The defendant, to show a reason for this slowing up of the car on the in-town side of Lauriat Avenue when the stop was on the out-of-town side, was allowed, subject to exceptions by the plaintiff, to introduce in evidence the following ordinance and regulation which required the speed of cars to be reduced when approaching an intersecting street and forbade the stopping of cars in front of such a street, and which the judge admitted in evidence after the plaintiff

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had refused to refrain from arguing that there was no reason for such slowing up of the speed of the car:

Revised Ordinances of the City of Boston of 1898, c. 6, § 24: "No person having the control of the speed of a street railway-car shall stop any such car on a cross-walk or in front of an intersecting street, except to avoid collisions or danger to persons, or as directed by a police officer."

Regulations of the Aldermen of Boston, 1903, c. 1, as revised and approved by the Railroad Commissioners, September 9, 1903: ". . . In approaching any public or private way intersecting that in which the railway is located the speed of the car must be reduced to such a rate as will make it possible to stop it immediately."

The witness Carney, referred to in the opinion, was a claim investigator and assistant to the trial attorney of the defendant. He had testified in cross-examination that he had not caused a number of persons, whose names appeared upon a report by the conductor of the car, to be summoned. On redirect examination, he testified, subject to exceptions by the plaintiff, that he had not summoned such persons because he had received from them communications in writing stating that they did not know anything about the accident.

Other material facts are stated in the opinion.

There was a verdict for the defendant; and the plaintiff filed a bill of exceptions. That bill stated that the statement by the judge in the colloquy at the bench at the close of the charge, referred to in the opinion, was "in the presence but not in the hearing of the jury." After the death of *Bond*, J., an amendment to the bill was allowed by *Wait*, J., striking out the above words and substituting the words, "at the judge's bench," and a substitute bill embodying that amendment afterwards was allowed by him.

The case was argued at the bar in March, 1913, before *Rugg, C. J., Hammond, Loring, Sheldon, & De Courcy*, JJ., and afterwards was submitted on briefs to all the justices.

J. L. Keogh, for the plaintiff.

F. M. Ives, for the defendant.

SHELDON, J. 1. The ordinances and regulations were properly admitted. They tended to show that the act of the defendant's servants which was complained of was required by competent

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authority, and so was not in itself negligent. *Maisels* v. *Dry Dock, East Broadway & Battery Street Railroad,* 16 App. Div. (N. Y.) 391. *Stiasny* v. *Metropolitan Street Railway,* 58 App. Div. (N. Y.) 172, affirmed in 172 N. Y. 656. This is the converse of the rule declared in *Stevens* v. *Boston Elevated Railway,* 184 Mass. 476, and *Horsman* v. *Brockton & Plymouth Street Railway,* 205 Mass. 519.

2. The witness Carney was allowed to testify that the reason he had not caused certain persons whose names had been taken by the defendant's conductor to be summoned as witnesses was that he had learned that they said they knew nothing about the occurrence. This was correct. The testimony did not tend to show, and was not admitted to show, that those persons in fact had no such knowledge. It tended to show the reason why Carney had not procured their attendance; and the jury could find that it was a good one. If so, it answered the claim which otherwise might have been made that the evidence was suppressed because it would have been unfavorable to the defendant. For this purpose it was competent to show Carney's belief and the reasons therefor. *Commonwealth* v. *Goldberg,* 212 Mass. 88, 91. *Rumrill* v. *Ash,* 169 Mass. 341, 347. *Commonwealth* v. *Costello,* 119 Mass. 214.

3. The plaintiff had reason to complain of the judge's charge as not covering the issues raised by the plaintiff's contention. That contention was that after the conductor's failure to cause the car to be stopped in accordance with the plaintiff's request, he went to the rear platform and complained to the conductor; that the conductor then gave the signal to stop the car at the next stopping place; that the plaintiff in preparation for alighting put his foot upon the step, having with his hand a tight hold on the guard or hand rail, ready to alight as soon as the car should have stopped; that the car slowed up and either stopped or came nearly to a full stop, at the regular stopping place; but that then the conductor gave the signal to start the car, it started with a sudden jerk, and threw the plaintiff off. This contention might seem improbable; but it was supported by the plaintiff's testimony, and he had a right to have the jury pass upon it. Upon the omission to charge the jury with reference thereto, he had a right to call the judge's attention to the matter and to save any exception that

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he might desire. Thereupon a colloquy took place at the judge's bench; and the judge said, "If that car came to a stop at the post on the other side of the street, where the car was expected to stop, intended to stop to let off passengers, and, before the plaintiff had time to get off, the car was suddenly started up and he was thrown, the defendant would be liable."

If this was said to the jury, or even merely in their hearing but so that they understood it to be the rule which they must follow if they found the facts to be as the plaintiff contended, any previous defect in the charge was cured, the plaintiff had his full rights, and he has now no ground of exception. If it was not given to the jury for their guidance, the plaintiff's exceptions must be sustained.

The burden is always upon the excepting party to make it manifest that he has been aggrieved. Whatever is necessary to show this must be averred. *Richards* v. *Smith*, 9 Gray, 315. As the plaintiff was not aggrieved if this language of the judge was addressed to the jury, it was for him to show that this was not so. His bill of exceptions says that it was at the close of the charge, presumably in the presence and hearing of the jury. It seems to have been taken down by the stenographer, which would tend to indicate that it was not a conversation apart, but part of the public proceedings of the trial. That it was said in a colloquy at the judge's bench does not indicate that it was not addressed to the jury. If it were not so addressed, that would naturally have been stated in the exceptions. It is of some significance that a statement that it was not in the hearing of the jury was at first made in the exceptions, and has since been stricken out by amendment, and the matter left wholly undetermined. Moreover, the language of the judge is such as he naturally would have addressed to the jury rather than merely to counsel upon the matter being brought to his attention.

On the whole, it does not appear that as the case finally was left to the jury, the plaintiff has any right of exception to the charge.

Exceptions overruled.

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PERCY PARKER *vs.* AMERICAN WOOLEN COMPANY.

Middlesex. January 21, 1913. — June 3, 1913.

Present: RUGG, C. J., MORTON, LORING, & SHELDON, JJ.

Watercourse. Equity Pleading and Practice, Appeal, Recommittal to master. *Equity Jurisdiction,* To enforce riparian rights, Damages. *Damages,* In equity.

In a suit in equity by an owner of land bordering on a stream against an upper riparian owner to enjoin the defendant from polluting the stream and for damages, a master to whom the case was referred found that the defendant had polluted the stream, and an interlocutory decree was made confirming the report and enjoining the defendant as prayed for. On an appeal by the defendant from such decree, this court ordered a decree for the plaintiff and gave him leave to move for a recommittal of the case to the master for an assessment of damages. *Held,* that the only questions that were open upon such recommittal were questions relating to damages, and that the defendant should not be permitted to introduce evidence to show that other persons besides himself caused the pollution complained of.

In a suit in equity by an owner of property on a stream to enjoin pollution of the stream and for damages, the plaintiff may recover not only for diminution in the rental value of his property during the time since the pollution began, but also for depreciation in the market value of the property, and for the cost of cleaning out his mill pond contaminated by the defendant's pollution, if he shows that he has suffered damages in those particulars because of the defendant's acts.

Where, in a suit in equity by a lower against an upper owner of land on a watercourse, it appears that certain damages were caused to the plaintiff by reason of pollution of the stream by the defendant, and that the water, in the condition in which it was when it reached the defendant and before he polluted it, would not have harmed the plaintiff, the plaintiff is entitled to full compensation for all the damage caused by the defendant's acts irrespective of the fact that, if the water when it came to the defendant had been purer, the pollution caused by the defendant would have been less injurious to the plaintiff.

Where, in a suit in equity by a lower against an upper owner of land on a watercourse, in which the plaintiff seeks damages, it appears that the defendant has polluted the stream without right, and the plaintiff claims as one element of his damages diminution in the rental value of his premises, and it also appears that the use which the plaintiff makes of the stream also pollutes it but that he has a prescriptive right so to use it, a request by the defendant for a ruling that the plaintiff, in computing the rental value of his property, is not entitled to include any profit "due to his own illegal pollution of the stream," is inapplicable and should not be granted.

BILL IN EQUITY, filed in the Supreme Judicial Court on April 11, 1902, by the owner of property on Beaver Brook in the town

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of Dracut, to enjoin the defendant, an upper riparian owner, from polluting that stream, and for damages.

The case was referred to Charles P. Greenough, Esquire, as master. An interlocutory decree was made by *Morton*, J., overruling exceptions to the master's report and confirming the report. On an appeal by the defendant, a decree for the plaintiff was ordered by this court, in a decision reported in 195 Mass. 591, and the plaintiff was given leave to move, if he so desired, that the case be recommitted to the master for the assessment of damages. Such a motion was made by the plaintiff and was allowed, and the report was recommitted.

Material portions of the master's second report were as follows:

"I find that from evidence introduced at the later hearings before me which tended to show that the water since 1902 above the defendant's mill had been contaminated by sewage discharged into the brook, — principally at the town of Derry some fifteen miles above the mill, — that the water just above the defendant's mill was not fit for drinking or domestic purposes; and if material, I find that after the year 1902 and until November, 1907, the water at the defendant's mill and after it had reached the plaintiff's mill, was not, in either locality, fit for drinking or domestic use. As no claim, however, has been made by the plaintiff, nor any evidence introduced by him as tending to show damages for the pollution of the water as drinking water or for domestic use, I have not considered that element of damage in my assessment of damages, nor this evidence material to the issues.

"I further find that the defendant purchased its mill in April, 1899, and operated it continually until the injunction was granted, November 1, 1907; and that from the date of the filing of the master's first report, namely, January 16, 1905, until November 1, 1907, the defendant still continued to discharge into Beaver Brook largely increased amounts of polluting substances, similar to those heretofore described, which rendered the water of the brook at the plaintiff's mill unfit for any form of manufacturing which required good clean water.

"I rule as a matter of law that the difference in rental value of the paper mill property, with and without the pollution of the water by the defendant, is the proper measure of damages.

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"The plaintiff claims damages for injury to his premises from April, 1899, to November 1, 1907; and, in particular, for the loss of rent or injury to its rental value during that time, except for the time from February 26, 1900, to September, 1900, when the paper mill was closed on account of a freshet in the brook, which materially injured and necessitated repairs to his paper mill plant."

After detailed findings of fact which formed the basis of the findings as to diminution of the rental value of the premises, as summarized below, the report continued as follows:

"I find further that there was an accumulation of deposits in the mill pond of the paper mill, and in the brook for some distance above the mill caused by the discharge of the various deleterious substances heretofore set forth into the brook from the defendant's mill, and that the cost of cleaning out the mill pond and brook would be the sum of $2,000; and I find that the defendant should pay the plaintiff that sum with interest thereon as further damages, at six per cent from November, 1907, to June 24, 1911, amounting to the sum of $440.

"I further find that no deduction from these sums should be made for the cost of filtration of the water issuing from the paper mill into the stream below; and I further find that if the evidence introduced on this subject is considered material, that the plaintiff has acquired the right by prescription to pollute the stream by unopposed use of over twenty-one years by himself and his predecessors in title.

"I also find that the piggery on Beaver Brook did not at any time substantially or materially contribute to the pollution of the brook during the period considered, and that the rendering plant above the mill ceased to do business in 1902, and did not contribute substantially or materially to the pollution of the brook before 1902.

"I find also that the plaintiff did not use proper care and good judgment in dismantling the paper mill and disposing of the machinery in 1902; and therefore find no damages due him from the defendant on this account; and that if he had not dismantled the mill he would, in my opinion, have been entitled to claim damages for the cost of the necessary care and upkeep of the machinery while the mill was unoccupied, until the date of the injunction;

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and that the cost of such care and upkeep of the premises would be $1,500 per year.

"I find also that the plaintiff is entitled to damages for the depreciation in the market value of this property, caused by the continued pollution of the water of the brook by the defendant from 1899 to 1907; and I find this amount to be the sum of $2,000.

"I find, therefore, that the plaintiff is entitled to recover as damages from the defendant the following amounts, viz.:

"(1) Diminution in rental value from 1899–1900,	$1,200.00
Interest on same to June 24, 1911,	762.00
(2) Diminution in rental value from 1900–1902,	3,850.00
Interest on same to June 24, 1911,	2,040.00
(3) Diminution in rental value from 1902–1907,	8,540.00
Interest on same to June 24, 1911,	1,770.00
(4) Cost of clearing out mill pond,	2,000.00
Interest on same to June 24, 1911,	440.00
(5) Depreciation in value of property,	2,000.00
Total,	$22,602.00"

The sixth and seventh rulings, which the defendant asked the master to make and which are mentioned in the opinion, were as follows:

"6. That if suit is brought against one defendant for damage caused by the pollution of a stream when several persons acting independently have contributed to the pollution of the stream, the damage for which the defendant is responsible must be distinguished from that caused by others by the best proof the nature of the case affords and his liability determined accordingly.

"7. That it is competent for the defendant to show, in mitigation of damages, that others were contributing to the pollution of Beaver Brook during the period of time for which the plaintiff claims damages in this suit."

Exceptions to the report were overruled and the report was confirmed by a decree made by *Morton*, J., who filed a memorandum of his decision containing the following, among other rulings:

"The former findings of the master and the rulings of the single justice and the opinion of the full court in 195 Mass. 591, must be taken, it seems to me, to have settled that the stream has been

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polluted so as to be unfit at the plaintiff's dam for any of the manufacturing purposes which require clean water, and that that pollution has been caused by the defendant. This renders, I think, incompetent and immaterial evidence that was introduced *de bene* and otherwise in respect to the pollution of the stream above the defendant's dam and as to the extent to which the defendant had contributed to its pollution at the plaintiff's dam. . . .

"If I am in error in this, then I think that the fact, if it is a fact, that others may have contributed to the pollution cannot, under the circumstances of this case, avail the defendant. If the amount of pollution caused by the defendant and the damage resulting to the plaintiff therefrom could be separated from that caused by others, then justice would require that the defendant should be held liable only for the damage caused by it. But no attempt has been made to separate the damage done by the defendant from that caused by others and manifestly it would be impossible to do so. Under such circumstances the defendant is liable for all of the damage which the plaintiff has sustained and will sustain by reason of the pollution by the defendant of the stream. . . . On one or the other of these two grounds it seems plain to me that evidence of pollution by others was and is incompetent and immaterial. . . .

"The defendant is liable for all damages sustained by the plaintiff which are the direct and proximate result of its pollution of the stream. In estimating those damages the nature of the property and the uses to which it has been and is adapted are to be considered. The property is a manufacturing property and the damages are to be estimated according to the injury done to it as such by the pollution of the stream. The plaintiff is entitled to have the damages measured by the most profitable use to which the property could be put for manufacturing purposes if the water in the stream had not been polluted by the defendant and was, in the words of the master, "good clean water." If as a result of the pollution the plaintiff has suffered a loss, as the master finds that he has, in the rental value of the property the defendant is, I think, liable therefor. I think further, that if the property has depreciated in market value in consequence of the pollution of the stream, as the master finds that it has, the de-

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fendant is liable for that also. . . . I do not myself see why the plaintiff may not recover not only for loss of rents, but also for depreciation in the market value of the property. I also think that if the defendant has discharged foreign substances into the stream which have caused accumulations in the pond at the plaintiff's mill and in the brook immediately above it, the defendant should pay the cost of cleaning out the pond and brook. I do not understand the defendant to contend that the allowance by the master of interest by way of further damages is wrong. These are the elements which the master has taken into account in the assessment of damages and it seems to me that they are all proper elements of damage."

A final decree was entered enjoining the acts complained of in the bill and awarding damages to the plaintiff in the sum of $23,995.79, and costs.

Both parties appealed, the plaintiff complaining only of the failure of the master to include in the damages the cost of the care and upkeep of the mill while unoccupied and before dismantled, which the master found was at the rate of $1,500 a year.

F. N. Wier, for the plaintiff.

S. L. Whipple & A. Lincoln, for the defendant.

SHELDON, J. When this case came on for hearing upon the master's second report and the exceptions thereto, the single justice ruled that it must be taken to have been settled by the former proceedings that the stream had been polluted so as to be unfit at the plaintiff's dam for any manufacturing purposes which required clean water, and that the pollution had been caused by the defendant. This was correct. It was the very point which was passed upon and decided when the case first came before us. *Parker* v. *American Woolen Co.* 195 Mass. 591. After that decision, the case was recommitted to the master for the assessment of the plaintiff's damages, and it is only matters bearing upon that question that now are open.

Many of the arguments that have been made for the defendant are upon questions of fact that were raised before the master. These no doubt were addressed to the master, and were given proper weight by him. Upon examination of the evidence reported, we do not find that any of his findings of fact that now are objected to were plainly wrong. Indeed they seem to have been

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well supported by the evidence before him. Accordingly we must accept them.

It could not have been ruled that the plaintiff's damages were to be measured solely by the diminution in the amount of the rental value of his premises, whether we take this to mean the loss of the rents and profits thereof or the diminution in the value of the use of his property during the period in question, due to the pollution caused by the defendant. These were elements to be considered in determining the amount of his damages, but they were not necessarily the sole matters to be looked at. One of the results of the defendant's wrongful acts, it has been found, was a depreciation of the value of the plaintiff's property. He would not obtain full justice unless he were compensated for this. His mill pond must be cleaned out, and the injurious deposits therein must be removed. Plainly he should recover the necessary expense of doing this. He is entitled to full compensation for all the injury done to him. So far as this included rental value, it must be the rental value of his premises in their condition at the time, but without the existing pollution of the water. Business profits have not been allowed to him. See as to these questions *White* v. *Moseley*, 8 Pick. 356, 359; *Bradley* v. *Rea*, 14 Allen, 20; *Johnson* v. *Holyoke*, 105 Mass. 80; *Horton* v. *Cooley*, 135 Mass. 589; *French* v. *Connecticut River Lumber Co.* 145 Mass. 261; *Pye* v. *Faxon*, 156 Mass. 471, 475; *Allen* v. *Boston*, 159 Mass. 324, 337; *Peak* v. *Frost*, 162 Mass. 298; *O'Brien* v. *Worcester*, 172 Mass. 348; *Atwood* v. *Boston Forwarding & Transfer Co.* 185 Mass. 557; *Weston* v. *Boston & Maine Railroad*, 190 Mass. 298; *Berry* v. *Ingalls*, 199 Mass. 77; *Phelps* v. *Berkshire Street Railway*, 210 Mass. 49; *Moore Spinning Co.* v. *Boston Ice Co.* 210 Mass. 364, 370; *Finley* v. *Hershey*, 41 Iowa, 389.

Doubtless the defendant is not to be held for damages resulting merely from the independent acts of third persons. But it chose to discharge noxious substances into the stream and thereby so to pollute the water as to cause loss to the plaintiff. The water, as has been found, was already somewhat contaminated from other causes, so that it was not fit for drinking or domestic use. But this degree of pollution did not of itself harm the plaintiff. The fact that under other circumstances, if for example the water as it came to the defendant had been pure, the pollution caused

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by the defendant might have been less injurious to the plaintiff, is not material. In this respect, the case is like that presented when an injury has been done by a defendant, either purposely or negligently, to a plaintiff, which would not appreciably have harmed a well and normally strong man but has more seriously affected the plaintiff by reason of some bodily weakness or infirmity peculiar to himself, as in *Coleman* v. *New York & New Haven Railroad,* 106 Mass. 160, 178. The wrongdoer takes the risk of the consequences that may result from his injurious act. See the cases collected in *Webber* v. *Old Colony Street Railway,* 210 Mass. 432, 442.

Doubtless the defendant and the third party who also contaminated the stream were not joint wrongdoers. And it is not necessary for us to determine whether the tortious acts of such third persons were independent acts within the strict meaning of that word, or whether, if the damage done to the plaintiff was due in part to the acts of the third parties, the defendant could yet be held liable for the whole damage on the ground that the torts of all of them co-operated in bringing about the one indivisible result of which the plaintiff complains, and so that all the parties must be treated as if they had been joint wrongdoers in intention as well as in the result brought about by their combined acts, according to the rule which has been applied in cases of personal injuries. *D'Almeida* v. *Boston & Maine Railroad,* 209 Mass. 81, 87. The rule that in a case like the one here presented separate wrongdoers acting independently of each other are liable only for their individual acts has been declared. *Mansfield* v. *Bristor,* 76 Ohio St. 270, and 118 Am. St. Rep. 852, and cases in note on p. 873. *Pulaski Anthracite Coal Co.* v. *Gibboney Sand Bar Co.* 110 Va. 444, and *Gibboney Sand Bar Co.* v. *Pulaski Anthracite Coal Co.* 24 L. R. A. (N. S.) 1185. The real distinction was perhaps taken in *Nitro-Phosphate & Odam's Manure Co.* v. *London & St. Katharine's Docks Co.* 9 Ch. D. 503, 527. On the findings of the master taken together, it sufficiently appears, as we have seen, that the pollution of the stream which caused the plaintiff's damage was due to the acts of the defendant and not to those of other parties. This is stated in the master's second report in his finding that the "pollution of the water and loss in rental value, was caused by acts of the defendant company." And again he

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found "that the piggery on Beaver Brook did not at any time substantially or materially contribute to the pollution of the brook during the period considered, and that the rendering plant above the mill ceased to do business in 1902, and did not contribute substantially or materially to the pollution of the brook before 1902." By reason of these findings the sixth and seventh requests for rulings which the defendant asked the master to give were inapplicable to the case. The rulings made by the single justice upon this question have done no injury to the defendant, and afford to it no ground of complaint.

The master's finding that the plaintiff had a prescriptive right to pollute the water at his paper mill made it unnecessary to give the ruling requested by the defendant, that in computing the rental value of his property the plaintiff was not entitled to include any profit due to his own illegal pollution of the stream. No such illegal pollution by the plaintiff was found. And the defendant's claim that it had put in as strong evidence of its own prescriptive right as that upon which this finding in favor of the plaintiff was made, if we assume that this position is now open to it, merely illustrates the rule that findings made by a master upon conflicting evidence are not lightly to be overthrown. The evidence in support of the two contentions did not seem to him to be equally strong, and we cannot reverse his conclusion.

On the master's findings, the plaintiff's claim for additional damages was properly disallowed.

It is unnecessary to consider the exceptions in detail. As we discover no reason for disagreeing with the findings of the master that have been contested before us, and no error of law in dealing therewith, the decree entered by the single justice must be affirmed; and it is.

So ordered.

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HARRIS MOSHENZ *vs.* INDEPENDENT ORDER AHAWAS ISRAEL. RACHEL SUPIRIOR *vs.* SAME.

Suffolk. December 4, 1912. — June 16, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & DE COURCY, JJ.

Fraternal Beneficiary Corporation. Contract, Performance and breach.

A foreign fraternal beneficiary corporation, engaged in this Commonwealth in the business of insurance conducted on the lodge system, issued to a member of a lodge a death benefit certificate by which it promised to pay to a certain beneficiary on the death of the member a certain sum to be collected by assessments made upon the other members, or such part of that sum as would be produced by one full assessment. On an information filed by the Attorney General under R. L. c. 119, § 19, the corporation was enjoined "from prosecuting any business of such corporation within this Commonwealth." The member thereafter died while in good standing, and the beneficiary named in the certificate duly presented a claim thereunder. Subsequently the injunction was modified to permit the corporation to defend actions brought against it and "to pay such claims as are now pending against it." The corporation refused to levy an assessment or to pay anything under the certificate, and the beneficiary brought an action thereon. *Held,* that the injunction as modified did not permit the corporation to levy an assessment for the payment of the plaintiff's claim, and that a further modification to that effect should not be created by implication; and therefore, no assessment having been levied and the defendant not being in default for not having made the levy, it had committed no breach of the contract of insurance by not paying the plaintiff's claim, although the contract of insurance remained in force.

TWO ACTIONS OF CONTRACT by beneficiaries under death benefit certificates issued by the defendant, a fraternal beneficiary corporation incorporated in New York. Writs dated respectively February 11 and April 14, 1905.

The cases were heard together by *Aiken,* C. J., upon agreed statements of facts. The eighth ruling asked for by the defendant and given by the Chief Justice, as stated in the opinion, was as follows:

"In this particular instance, no assessment was or could be levied by reason of the injunction order; hence there is no mode of enforcing the collection of the assessment, and no mode of providing for payment of same, unless the defendant would wil-

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fully disobey the injunction order, and thereby make itself and its officers liable for contempt of court."

The Chief Justice found for the plaintiff in each case in the sum of $690.50; and the defendant alleged exceptions.

The cases were submitted on briefs.

D. A. Lourie, A. A. Ginzberg & M. Tobey, for the defendant.

C. H. Dow, J. E. Eaton & E. T. McKnight, for the plaintiffs.

BRALEY, J. The defendant is a foreign fraternal beneficiary corporation engaged in insurance conducted on the lodge system, with subordinate lodges in this Commonwealth. It issued certificates of membership to Sarah Moshenz and Harris Supirior, in which, upon their death, if in good standing, the defendant promised to pay to their beneficiaries the sum of $500 when collected by assessments at the time and in the manner provided by the constitution and laws of the order. But if one full assessment did not produce this sum, then the amount was not to exceed the proceeds actually realized. The insured members have died and, due notice of their death having been given, the defendant has neglected to levy an assessment or to pay the claims, and these actions are brought by the beneficiaries to recover the maximum amount which it concedes would have been received had the assessment been laid.

The defendant's promise in the certificate, as well as by the first section of the fifth article of the laws, is to pay the amount of one assessment collected from members of the order by assessments to the respective lodges and, if not in default, it has the right to insist on the provisions of the contract. No suggestion is found in the agreed facts that satisfactory proofs of death had not been furnished. It is not affirmatively stated that the decedents had failed to pay or to tender all dues, assessments or taxes for which they were liable, nor is it contended that the plaintiffs should have resorted to a bill in equity for specific performance, and under the circumstances ordinarily an action at law could be maintained. *Burdon* v. *Massachusetts Safety Fund Association,* 147 Mass. 360, 367. *Dean* v. *American Legion of Honor,* 156 Mass. 435. *Garcelon* v. *Commercial Travellers' Eastern Accident Association,* 184 Mass. 8. 29 Cyc. 211.

The principal defense is, that when the certificates matured the defendant, having been enjoined from transacting business

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in this Commonwealth, could not lawfully levy the necessary assessments and there has been no breach. The injunction was granted under R. L. c. 119, § 19, upon proof that the defendant had violated §§ 7 and 8 of this chapter by appropriating a part of its death and emergency fund in payment of money lent to the corporation. But, if restrained "from prosecuting any business of such corporation within this Commonwealth until the further order of the court," it was not released from its contracts of insurance. *Commonwealth* v. *Barnstable Savings Bank*, 126 Mass. 526, 531. *Rice* v. *Barnard*, 127 Mass. 241. *Rosenbaum* v. *United States Credit System Co.* 32 Vroom, 543. *Decker* v. *Gardner*, 124 N. Y. 334. If interpreted as not embracing the claims in suit, which accrued after the proceedings were instituted and the injunction had issued, the only effect of the decree would be to restrain the solicitation of insurance in the future and the issuance of new certificates. Doubtless, as the information alleged, the defendant's condition was such "as to render its further proceedings in this Commonwealth hazardous to the public and to its certificate holders therein," yet the decree might have provided that, while new business could not be solicited, applications received or certificates issued, the defendant, in justice to its resident members, should be permitted to levy the necessary assessments and pay maturing death claims in accordance with the terms of outstanding certificates. The subsequent modifications of the injunction permitted the defendant to defend actions, and to "pay such claims as are now pending against it."

The decedents were members, and the plaintiffs cannot set up the illegal acts of the officers of the corporation, which is not estopped, even under the injunction as modified, to plead its incapacity to make payment. *Commonwealth* v. *Wetherbee*, 105 Mass. 149. *Kidder* v. *United Order of the Golden Cross*, 192 Mass. 326. *Trenton Mutual Life Ins. Co.* v. *McKelway*, 1 Beas. 133.

And the burden is upon the defendant to maintain this defense. *Ferguson* v. *Union Mutual Life Ins. Co.* 187 Mass. 8, 14. *Kidder* v. *United Order of the Golden Cross*, 192 Mass. 326, 336.

The defendant, the decedents and the plaintiffs during the continuance of the injunction were alike restrained by force of law from taking any steps in the performance of the mutual and

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dependent stipulations of the contract and neither party could gain any advantage over the other. *Webb Granite & Construction Co.* v. *Worcester*, 187 Mass. 385, 390, 391, and cases cited. *Hill* v. *Baker*, 205 Mass. 303, 308. *People* v. *Globe Mutual Life Ins. Co.* 91 N. Y. 174. *Union Trust Co.* v. *Southern Inland Navigation & Improvement Co.* 130 U. S. 565.

The modification permitting the payment of claims now pending, although asked for by the informant, presumably received the defendant's assent. It apparently speaks only of the present, and the agreed facts are silent as to whether there were matured claims other than those of the plaintiffs'. If the defendant was unable to respond, the modification should have been so framed as to permit the necessary levies. It is not thus worded, and a qualification of such gravity, when viewed with the purpose of the information, should not be inserted by implication, where the terms of the decree are neither indefinite nor uncertain.

It is plain that the defendant, in performance of its contracts, was not empowered to levy assessments in the manner provided by its constitution and laws, but it received permission only to pay, at its option, from funds derived from other sources which could be lawfully appropriated for that purpose. To construe the record as authority for the levying of assessments would enable the defendant to resume the doing of business, in violation not only of the letter but of the spirit of the injunction.

The eighth ruling was right. But if prohibited from raising the money by assessment, there has been no breach of the contract as alleged in the declaration, and the defendant's request that upon all the evidence the plaintiffs could not recover should have been given. *Garcelon* v. *Commercial Travellers' Eastern Accident Association*, 184 Mass. 8. *Brann* v. *Marine Benefit Life Association*, 92 Maine, 341. *O'Brien* v. *Home Benefit Society*, 117 N. Y. 310, 318, 319.

Exceptions sustained.

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WHIDDEN and COMPANY, Incorporated, *vs.* EBEN D. JORDAN & another, trustees.

Suffolk. December 13, 1912. — June 16, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Contract, In writing. *Evidence*, Extrinsic affecting writings.

The parties to a contract in writing for the construction of a building, which provided that the final payment should be made only when the architect certified that the work was completed, made a subsequent contract in writing, which recited that a controversy had arisen between the parties as to the amount due upon the contract and provided that the contractor should accept and the owner should pay $35,000 in full settlement of all claims, whereof $25,000 should be paid forthwith and the balance should be paid as provided by the terms of the first contract. The $25,000 was paid and the contractor brought an action against the owner for the balance of $10,000. The defendant offered to prove that when the second contract in writing was made a portion of the building had not been completed and "that it was the purpose of the parties to provide that the $10,000 should be paid only when the waterproofing of the sub-basement was completed in accordance with the terms of the contract." This evidence was excluded by the judge, who ordered a verdict for the plaintiff. *Held*, that the words of the contract were not plain and that the evidence should have been admitted to show their true meaning as relating to a contract that had not been completed.

CONTRACT to recover $10,000 as a balance alleged to be due upon a contract in writing dated March 6, 1909, to construct for the defendants a building on Avon Street in Boston for the sum of $760,000, in accordance with an alleged promise to pay such balance contained in a further contract in writing between the parties dated February 15, 1911. Writ dated June 5, 1911.

In the Superior Court the case was tried before *Wait*, J. The plaintiff introduced in evidence the contract of February 15, 1911, and also the contract of March 6, 1909.

The contract of February 15, 1911, was as follows:

"Agreement between Eben D. Jordan and Edward J. Mitton, Trustees of the Avon Street Trust, and Whidden & Company, Inc.

"Whereas, a controversy has arisen between the parties as to the amount due from the Trustees to Whidden & Company, Inc., for the construction of the addition to the building on Avon Street

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and Bedford Street, under a contract dated March 6, 1909, or otherwise; and

"Whereas, Whidden & Company, Inc., has agreed to accept thirty-five thousand dollars in full settlement of all its claims of every kind and description growing out of the construction of said building, and the Trustees have agreed to pay said sum of thirty-five thousand dollars on the following terms and conditions: —

"Twenty-five thousand dollars to be paid forthwith;

"The balance to be paid as provided by the terms of said contract;

"Now, therefore, Whidden & Company, Inc., releases and discharges said Jordan and Mitton, as trustees as aforesaid, from any and all claims it now has or may in the future have against them growing in any way out of the construction of said building, except its aforesaid claim for said balance of ten thousand dollars.

"And the Trustees release and discharge said Whidden & Company, Inc., from any and all claims which they now have or may in the future have against it in any way growing out of the construction of the said building, with the exception of any claim they now have or may in the future have against Whidden & Company, Inc., under the clause in the specifications accompanying said contract entitled "Liability for Accidents." No action shall be brought for the amount of said claim, unless the Trustees have first offered to arbitrate the same under Clause II of said contract and, after reasonable time, arbitration has been refused.

"In witness whereof the Trustees have hereunto set their hands and seals and Whidden & Company, Inc., has caused this instrument to be signed and its corporate seal to be hereto affixed by Renton Whidden, its president, thereto duly authorized, this fifteenth day of February, 1911."

Here followed the signatures and the seals of the parties.

It appeared that the $25,000 mentioned in the contract of February 15, 1911, was paid by the defendants to the plaintiff. The defendants admitted that at the date of the writ no lien or attachment was permitted to be filed or remain on the property of the defendants or any part of the premises for or on account of any labor or materials claimed or other demand against them; that at the date of the writ there was no lien, attachment or incum-

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brance caused or suffered by the contractors lawfully existing on the premises; and that the defendants had not been restrained from making any payment by any legal process. The plaintiff then rested.

Thereupon the defendants offered to prove that on February 15, 1911, there was a controversy between the parties as to numerous matters involving the construction of the building and involving the penalties for delay, and that it was asserted by the defendants (and the assertion was understood by the plaintiff) that a portion of the building had never been completed, namely, the waterproofing of the sub-basement, and that it was the purpose of the parties to provide that the $10,000 should be paid only when the waterproofing of the sub-basement was completed in accordance with the terms of the contract.

The judge excluded the evidence offered and ruled that all controversies in relation to the construction of the building existing between the parties on February 15, 1911, were disposed of by that contract and that the plaintiff was entitled to recover on the evidence submitted.

The judge ordered the jury to return a verdict for the plaintiff in the sum of $10,792; and the defendant alleged exceptions.

C. K. Cobb, for the defendants.

E. R. Anderson, (*G. A. Sweetser* with him,) for the plaintiff.

LORING, J. The contract of March 6, 1909, provided that "Final cash settlement hereunder shall become due and shall be paid on demand after such expiration of time, but only on the conditions, viz.,

"1. That no lien, attachment, or incumbrance caused or suffered by the contractors then lawfully exist in the premises, and

"2. That the owners be then restrained from making such payment by no legal process; and

"3. That at such time the final balance on all accounts then due the contractors from the owners in the premises shall have been found and certified accordingly in writing by the architects and the contractors, or found and determined by the award of the arbitrators as hereinafter provided."

It is the defendants' contention that the payment of the $10,000 specified in the agreement of compromise of February 15, 1911, was made subject to the third clause set forth above as well

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as to the first and second clauses by virtue of the provision in the agreement of compromise that "The balance [$10,000, was] to be paid as provided by the terms of said contract." That is to say, the $10,000 was to be paid when the architects certified that the work was "complete and perfect in every respect . . . to the satisfaction of Winslow, Bigelow & Wadsworth, successors to Winslow & Bigelow, of Boston, Architects." If this be the true meaning of that clause, the controversy which was settled by the agreement of compromise was a controversy as to the amount due or to become due, not a controversy as to the amount then due.

It is the plaintiff's contention on the other hand that the controversy which was settled by the agreement of compromise was as to the amount then due and that consequently compliance with the third clause set forth above was dispensed with by the agreement of compromise which fixed the amount then due. That left the first and second clauses as the only provisions of the original contract on which the words in question (namely, "The balance to be paid as provided by the terms of said contract") should operate. In that case the balance was to be paid at the time provided by the contract, not as provided by all the terms of said contract.

A controversy as to the amount due does not ordinarily arise between a contractor and the owner until the contractor asserts that he has completed his work, and, if a controversy as to the amount due arises when a contractor asserts that he has completed his work, the controversy as to the amount due includes *inter alia* the question whether the work has been completed. For these reasons, in the absence of evidence as to the circumstances under which the contract was made, we are of opinion that the construction given to the agreement in the Superior Court was correct.

But we are also of opinion that the wording of the contract is not plain, and that evidence of the circumstances under which it was made is admissible to ascertain the true meaning of it.

Formerly the rule on which the courts went in admitting or excluding such evidence was Lord Bacon's distinction between a patent and a latent ambiguity. See for example *Putnam* v. *Bond*, 100 Mass. 58. As to Lord Bacon's distinction see Wig-

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more, Ev. §§ 2472 *et seq.* But in the later cases, if the wording of the contract is such that the circumstances under which it was made would control the meaning to be given to it, the evidence has been admitted. See for example *Proctor* v. *Hartigan*, 143 Mass. 462; *Macdonald* v. *Dana*, 154 Mass. 152; *Bassett* v. *Rogers*, 162 Mass. 47. The reason why it is not competent to add to, contradict or vary a written agreement is because where a trade between two parties is struck by their entering into an agreement in writing the trade struck is that stated in the written agreement. *Butterick Publishing Co.* v. *Fisher*, 203 Mass. 122. If the terms of the trade which are in writing are plain, they cannot be added to, contradicted or varied by parol. But if they are not plain, the true meaning of them can be ascertained by evidence of the circumstances under which the written contract was made.

In the case at bar the defendant offered to prove "that it was the purpose of the parties to provide that the $10,000 should be paid only when the waterproofing of the sub-basement was completed in accordance with the terms of the contract." That was in effect an offer to prove that at the date of the contract there was no controversy as to the fact that the contract had not been completed by reason of the failure to finish the waterproofing of the sub-basement. If there was in fact no controversy in respect to the contract not having been completed, this agreement could not be construed to be a settlement of a controversy as to that matter and the construction contended for by the defendants must be adopted.

Exceptions sustained.

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ROCHESTER TUMBLER WORKS *vs.* MITCHELL WOODBURY COMPANY.

Suffolk. December 13, 1912. — June 16, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Release. Contract, In writing. *Receiver. Practice, Civil,* Parties, Waiver at argument. *Waiver.*

In an action of contract for a sum of money alleged to be due to the plaintiff, where the sole defense relied upon is a release in writing given by the plaintiff to the defendant and alleged by the defendant to include the plaintiff's present claim, if there is no ambiguity in the terms of the instrument, evidence of what was said in the negotiations that resulted in the execution and delivery of the release, although admitted without objection, cannot be considered in interpreting its meaning, and whether the defendant asked for a "full release" and the plaintiff agreed to give such a release is of no consequence.

A release, executed and delivered by the receiver of the property of certain corporations to a person who owes the price of goods sold to him by such corporations and also owes the price of other goods sold to him by the receiver after his appointment, by which instrument the receiver agrees to discharge the debtor "from any further obligations or accounts due to the above named companies," does not discharge the debtor from his obligation to pay for the goods purchased by him from the receiver.

The receiver of the property of a corporation in suing for the price of goods sold by him as receiver must sue in his own name as such receiver; and, if he brings an action for the price of such goods in the name of the corporation by him as receiver, he is not entitled to recover, unless the defense that the action is brought by the wrong party is waived, as it was in the present case.

At the argument of exceptions in an action for the price of goods sold by the receivers of the property of a corporation, which was brought improperly in the name of the corporation by them as receivers, when it should have been brought by the receivers in their own names, if the defendant states in his brief that "there is no dispute as to the prices charged or as to the receipt of the goods by the defendant" and that "the sole defense was that the plaintiffs' claim had been discharged by an instrument in writing," this is a waiver of any objection to the form of the writ and of the defense that the action was brought by the wrong party.

LORING, J. The defendant bought of one Thompson, receiver of the Rochester Tumbler Works, three lots of merchandise, and later bought, of Thompson and a co-receiver subsequently appointed, a fourth lot. This action was brought to recover the price of the four lots, amounting to $214.35. The four lots were bought in March and April, 1908. At the trial the defendant

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admitted that it bought the goods but insisted that a release to the defendant executed by the receivers on February 17, 1910, covered the purchases here in question.

The following facts in connection with the release were put in evidence without objection, and on those facts, taken in connection with the release itself, the presiding judge* left it to the jury to find whether the sales here in question were included in the release.

The facts referred to were these: Thompson was appointed receiver of the Rochester Company on December 7, of the Riverside Company on December 10, and of the Crystal Glass Company and the Ohio Flint Glass Company on December 17, 1907. Before the receiverships these four companies had sold merchandise to the defendant which, with interest to February 16, 1910, amounted to $4,277.51. The defendant had refused to pay the receivers this sum on the ground that it was entitled to a rebate, and four actions had been brought in the Superior Court to collect these amounts. At first the receivers refused to allow the rebate insisted upon by the defendant, but later they changed their position on this point, and in February, 1910, they came to Boston, called upon the president of the defendant company, and presented to him a written statement (which afterwards was annexed to the release subsequently made), in which the details making up the $4,277.51 were stated and, in addition, the details of the rebate amounting to $1,971.33, which they were then ready to concede. This made the net amount due from the defendant $2,306.17. The receivers presented this statement to the president of the defendant company. He left the room and on his return said that he accepted their figures, and thereupon one of the receivers dictated the agreement of compromise, the material part of which is hereinafter set forth, to which a copy of the statement mentioned above was annexed. This was executed in duplicate the next day, and later the $2,306.17 was paid by the defendant to the receivers.

The president of the defendant company testified that when he left the room he took to his bookkeeper the receivers' statement or the amount shown by the statement to be due from

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* *Hitchcock*, J.

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the defendant company, and finding that it was less than the amount which the books of his own company showed to be due he accepted the receivers' figures without verifying the accuracy of their computation. On cross-examination he testified that at first the purchases made by him from the receiver were put into the account of purchases made by him from the companies, because "the bookkeepers did not understand," while later a new account was opened on the defendant company's books of the purchases made by it from the receivers. He further testified that the first of these two accounts included the four purchases made by the defendant company from the receivers as well as the purchases made by the defendant company from the several companies before the receiverships. The president further testified that at the interview on February 16, 1910, he told the receivers that he "would take their settlement if they would give me a full release, which they agreed to do." Both receivers testified that a full release was not granted, asked for or spoken of at this interview. It was testified to at the trial without contradiction that there was no rebate on sales made by the receivers. It did not appear that any rebate on receivers' sales had been claimed at any time.

On September 10, 1910, Thompson wrote to the defendant stating that the three parcels of merchandise bought by the defendant of him as receiver in March and April, 1908, had been overlooked, and asking it to pay for them. A similar letter was written on the same day by the two receivers with respect to the fourth lot of merchandise bought by the defendant of the two receivers in April, 1908. The defendant answered that it had a receipt in full from the receivers and refused to pay; whereupon this action was brought.

The defendant asked for the following rulings :

"1. That on all the evidence the verdict must be for the defendant: 2. A claim for goods sold by the receivers to the defendant would be a claim of the plaintiff company and would be an account due the plaintiff company: 3. A claim or account for the goods sold the defendant was a claim or account due the Rochester Tumbler Works and not due the receivers." These were refused and exceptions were taken. The defendant took a further exception to that part of the charge in which the pre-

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siding judge told the jury that the burden was on the defendant to prove that the claim here sued on was covered by the release. The plaintiff had a verdict, and the case is here on these exceptions.

The settlement made between the receivers and the defendant company on February 17, 1910, was in writing. Being in writing the question whether it did or did not release the defendant from the debt due to the receivers for the four purchases made by it from them depends upon the terms of the written agreement. If the terms of the agreement had been ambiguous, the circumstances under which it was made would have been admissible to ascertain its true meaning. *Whidden & Co.* v. *Jordan, ante,* 189; while no recourse to outside facts was necessary or admissible to ascertain its meaning if its terms were not capable of more than one construction. In either event evidence of what was said in the course of the negotiations which led up to the making of the settlement made in writing was inadmissible to add to, vary or contradict it. And this is true even if (as was the case here) that evidence is admitted without objection. *Mears* v. *Smith,* 199 Mass. 319. *Butterick Publishing Co.* v. *Fisher,* 203 Mass. 122. *Fairfield* v. *Lowry,* 207 Mass. 352, 358. Whether the president of the defendant company did or did not ask for a "full release" was incompetent and of no consequence.

The written agreement here in question recites that "a settlement having been reached between the trustees or receivers" of the four companies (the Crystal Glass Company, the Riverside Glass Company, the Ohio Flint Glass Company and the Rochester Tumbler Works) and the defendant company, whereby the defendant company is to pay the receivers $2,306.17 and costs incurred by it, and the receivers are to pay their own costs "and are to discharge said Mitchell Woodbury Co. from any further obligations or accounts due to the above named companies," the receivers acknowledge payment of $1,306.17 and agree as to the payment of the remaining $1,000 which had been trusteed.

"Further obligations or accounts due to the above named companies" includes all amounts due the four companies for sales made by them or either of them, but it does not include sums due the receivers for sales made by them.

It did not appear at the trial for what reason the receivers here

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in question had been appointed receivers. But the fact that they were appointed receivers of itself means that they were not acting as agents of the company of which they were appointed receivers, or on its behalf alone. A receiver is appointed to preserve property the title to which is in litigation until it is determined to whom that property belongs, or in some cases (generally statutory ones) to wind up the affairs of an insolvent corporation, reduce its property to cash and distribute it among its creditors. But whichever of the two be the nature of a particular receivership, money due for a sale by the company before the receivership and money due for a sale by the receiver are quite different in character. In case of a debt due the company for a sale made by it the receiver collects a chose in action of the company. The chose in action is due under a contract made by the company subject to all equities by way of set-off or otherwise which exist between the company and the debtor. In case of a company debt the receiver sues in the name of the company which was party to the contract unless the chose in action has been assigned to him and he is allowed by the law of the forum to bring an action as assignee in his own name. But in case of a debt due for a sale made by a receiver, the receiver is the party to the contract of sale, the action for that reason must be brought in his own name and is not subject to any equities by way of set-off or otherwise which could be set up by the company. The difference between the two is elementary and needs no citation of authorities in its support. We should not have thought it necessary to explain the distinction at length had it not been that the defendant's argument is founded upon a failure to recognize it.

The presiding judge should have instructed the jury that the debt here sued on was not covered by the release. In leaving that question to the jury the judge gave an instruction which was more favorable to the defendant than it was entitled to.

There is one ground on which the exception to the refusal to direct a verdict for the defendant would have had to be sustained had it not been waived by the defendant. This writ was sued out in the name of the "Rochester Tumbler Works, a corporation duly organized under the laws of the State of Maine, which brings this action by Addison Thompson, its trustee and Receiver." Later the writ was amended "by striking out the

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words 'by Addison Thompson its trustee and receiver,' and inserting in place thereof the words 'by Addison Thompson and Harry S. Toynbee, its trustees and receivers.'" That is the proper writ for the collection of a debt due under a contract made with the Rochester Tumbler Works. But it is not the proper writ in case it is sought to collect a debt due under the two contracts here in question, one made by the defendant with Thompson when sole receiver and the other by it with Thompson and Toynbee when joint receivers of the Rochester Tumbler Works. But the defendant company in its brief states that "there is no dispute as to the prices charged or as to the receipt of the goods by the defendant. The sole defense was that the plaintiffs' claim had been discharged by an instrument in writing dated February 17, 1910." The objection to the form of the writ was thereby waived, and the entry must be

Exceptions overruled.

H. H. Bond, for the plaintiff.
G. P. Wardner, for the defendant.

ANDREA POLVERE, administrator, *vs.* HUGH NAWN CONTRACTING COMPANY.

Suffolk. December 13, 1912. — June 16, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Negligence, Employer's liability. *Evidence*, Declarations of deceased persons. *Practice, Civil*, Amendment.

If a workman, employed in removing a hill or bank of sand and gravel, is working on the slope loosening the sand with a pole, when the superintendent under whom he is working is informed that there is an overhang at the top of the slope which is likely to fall unless broken up and that it is not safe to work beneath it, but the superintendent replies that he does not think it necessary to break up the overhang and that the place is safe enough, and the same informant then tells the workman that he does not think it safe for him to work where he is working, but also tells him that the superintendent said that he did not think that the overhang would come down and said that it would not come down, and thereupon the workman, relying on the assurance of the superintendent thus reported to him, continues to work on the slope and the overhang

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breaks off and produces an avalanche which injures the workman and causes his death after conscious suffering, the employer is not liable at common law to the administrator of the estate of the workman for the suffering caused by his injuries, because at common law the superintendent was a fellow servant of the injured workman, but, in an action under the employers' liability act for causing the death of the workman, there is evidence that the death was caused by the negligence of a superintendent of the defendant.

In an action under the employers' liability act for causing the death of a workman of the defendant, it appeared that the deceased workman had a father and mother in Italy who were "pretty old" and that the workman had contributed to their support by sending them money, that he had been in this country for eighteen months and was killed in the month of December. A witness, against the defendant's exception, was allowed to testify that the workman said to him that his parents were in need of the money because they did not get any money from the crops, that their farm was bad, and that "the crops had come and there was not enough to pay the interest for hiring the place." *Held*, that the crops referred to must have been those after the deceased workman had left Italy and therefore that his declaration concerning them could not have been made upon his personal knowledge and should have been excluded under R. L. c. 175, § 66.

Under R. L. c. 175, § 66, a declaration of a deceased workman, who had come to this country eighteen months before the accident that caused his death, that his elderly parents, whom he left in the country of his birth, were in need of the money that he sent to them from his wages earned here, may be found to have been based on facts known to the declarant before he left the foreign country and thus to have been made upon his personal knowledge.

In an action by an administrator for causing the death of the plaintiff's intestate, where the allegations of the declaration warranted a finding that the cause of action relied on by the plaintiff when the action was commenced was under R. L. c. 106, § 72, and had been misdescribed, the allowance under R. L. c. 173, §§ 48, 121, of an amendment completing the statement of that cause of action is conclusive evidence of the identity of the cause of action.

Tort by the administrator of the estate of Donato Polvere against the employer of the plaintiff's intestate, with two counts, the first at common law for personal injuries sustained by the intestate on December 1, 1908, and the second under the employers' liability act for causing his death by the injuries. The allegations added to the second count by the amendment mentioned in the opinion were, that the death of the intestate was not instantaneous and was preceded by conscious suffering, and that at the time of his death he had next of kin, a father and mother named, who were dependent on his wages for support and were living when the action was brought. Writ dated July 14, 1909.

In the Superior Court the case was tried before *Pratt*, J. The facts which could have been found upon the evidence are stated

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in the opinion. At the close of the evidence the defendant asked the judge to make the following rulings:

"1. Upon all the evidence and the pleadings in the case, the plaintiff is not entitled to recover.

"2. Upon all the evidence, the plaintiff is not entitled to recover under the first count of his declaration.

"3. Upon all the evidence, the plaintiff is not entitled to recover under the second count of his declaration."

"7. Under the second count of the plaintiff's declaration, the plaintiff is not entitled to recover damages for the death of the plaintiff's intestate."

The judge refused to make any of these rulings, and submitted the case to the jury, who returned a verdict for the plaintiff in the sum of $4,500, of which they apportioned $1,500 on the first count for conscious suffering, and $3,000 on the second count for causing death. The defendant alleged exceptions.

The case was submitted on briefs.

E. C. Stone, for the defendant.

J. E. Crowley & W. R. Buckminster, for the plaintiff.

LORING, J. The amended declaration in this action contained two counts, one at common law for bodily suffering and the other under the employers' liability act for the death of the plaintiff's intestate.

The defendant was engaged in the work of taking down and carrying away a bank or hill of sand and gravel. At the foot of the slope of the hill there was a pit or hole some twenty-five feet long, twelve feet wide and four feet deep. In this pit were two buckets three feet deep and three feet wide. Two men with long poles stood on the slope of the hill to loosen the sand and gravel which thus set in motion ran down into and filled the buckets. The buckets were then hooked on to a block running on a cable (as we understand the bill of exceptions) and were pulled across to the railroad where they were dumped into cars and carried away. On the morning in question, while the intestate was on the slope, an avalanche of sand and gravel carried the intestate down the slope on to one of the buckets. One of his legs was caught between the bail of the bucket and the bucket itself, and before he could extricate himself he was covered with sand and died of suffocation.

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The jury were warranted in finding that this accident was caused through the negligence of one Connors, who was admitted by the defendant to be a superintendent within the meaning of the employers' liability act. The negligence (which the jury were warranted in finding) consisted in this: Early in the morning of the day of the accident one of the gang loading the bucket, which the intestate was not at work upon, went on top of the hill with a sledge hammer and knocked down a frozen four-foot overhang at the top of the slope. He then walked along the top to the other end of the slope, being the end where the plaintiff's gang was at work, and found a crack about an inch wide, some five or six feet long, and some four feet back from the edge of the slope. The witness then called to Connors the superintendent that there was a crack at that end of the slope, and that the "overhang . . . ought to be broken the same as I broke my end," and that it was not safe to work underneath it. To this Connors answered that he did not think it was necessary, that it was safe enough. At this time the intestate was at work on the slope below the overhang just spoken of, loosening the sand with a pole. The talk between the witness and Connors was in English and the intestate (an Italian) did not understand English. Thereupon the witness told the intestate in Italian that he (the witness) did not think it safe for him (the intestate) to work where he was working, but that Connors "did not think it [the overhang] would come down;" that Connors "said that it would not come down." The overhang did break off as the witness said it would, and caused the avalanche which killed the intestate.

On this evidence the plaintiff was not entitled to recover on the common law count. At common law Connors was a fellow servant. On the plaintiff's evidence the intestate was an experienced workman, having been at work on this bank for eighteen months. He had been told of the conditions which might make the place where he was at work dangerous and chose to continue his work in reliance upon Connors. In this respect the case differs from *Gettins* v. *Kelley*, 212 Mass. 171. The assurance of safety in *McKee* v. *Tourtellotte*, 167 Mass. 69, was given by the defendant himself, while in the case at bar it was given by a fellow servant. *Fitzsimmons* v. *Taunton*, 160 Mass. 223, was the

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case of the caving in of a trench where the jury could have found that the defendant had notice of the danger and the plaintiff did not. We find nothing in the other cases relied on by the plaintiff in this connection which requires mention.

Judgment for the defendant should be entered under the statute on the first count.

But this evidence did make out a case under the employers' liability act on the part of a superintendent. See in this connection *Carriere* v. *Merrick Lumber Co.* 203 Mass. 322; *Gettins* v. *Kelley*, 212 Mass. 171. The third and seventh rulings asked for were rightly refused.

There was error, however, in the admission of some of the declarations of the intestate which were admitted under R. L. c. 175, § 66. It had appeared from evidence introduced by the plaintiff that the intestate had a father and mother in Italy who were "pretty old," and that the intestate had contributed to their support by sending them money. It also had appeared that the intestate came to this country eighteen months before the accident and had been continuously in the defendant's employ since his arrival.

On cross-examination of one of the defendant's witnesses the counsel for the plaintiff, against the objection and exception of the defendant, was allowed to ask why the intestate said that he sent money to his parents, and he answered that he (the intestate) said "they were in need of it;" and in answer to the further question "Did he say why they needed it," he was allowed to testify: "They did not get any rental from the crops and they needed the money to support themselves;" and to further questions, that he said that their farm was bad; that "the crops had come and there was not enough to pay the interest for hiring the place."

As we have already said it appeared in the evidence that the intestate came to this country in June, 1907, and remained here until he was killed on December 1, 1908. Unless the crops referred to in his declarations (admitted in evidence against the defendant's objection) were the crops of 1906 or earlier years, he could not have had personal knowledge of their failure. Manifestly the crops referred to in the declaration of the intestate were not the crops of 1906 and earlier years. These declarations therefore could

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not have been admitted even under R. L. c. 175, § 66, and the exception to their admission must be sustained.

As the case must go back for a new trial we will deal with matters argued here which are likely to arise there.

1. The other declarations of the intestate were properly admitted. The fact that his parents were in need of his money might well be found to rest on facts known to the intestate before he left Italy.

2. In the original second count there was an allegation that the intestate "received grievous personal injuries so that he afterwards died," and an allegation that "due notice of the time, place and cause of said injury was given to the defendant." These allegations warranted a finding that the cause of action relied on by the plaintiff when the action was commenced was one under R. L. c. 106, § 72, which had been misdescribed, and the amendment was properly allowed. R. L. c. 173, §§ 48, 121. And, the finding being warranted, the allowance of the amendment is conclusive evidence that the cause of action relied on originally is the same as that set forth in the amendment. *Tracy* v. *Boston & Northern Street Railway*, 204 Mass. 13.

Judgment must be entered for the defendant on the first count and a new trial granted on the second count.

So ordered.

COMMONWEALTH *vs.* FRANK M. MERRILL.

Middlesex. January 20, 1913. — June 16, 1913.

Present: RUGG, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON, & DE COURCY, JJ.

Beneficiary Association. Evidence, Official copies.

R. L. c. 119, § 13, providing for the filing with the insurance commissioner by a foreign fraternal beneficiary corporation of a copy of its constitution, before this statute was amended by St. 1911, c. 628, § 16, did not apply to unincorporated foreign beneficiary associations, and consequently, if a copy of the constitution of such an unincorporated association was filed under that statute, it did not become a public record, of which by R. L. c. 175, § 74, an attested copy would be competent evidence in all cases where the original would have been competent.

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A copy of the by-laws of an unincorporated foreign beneficiary association, which R. L. c. 119, § 12, as amended by Sts. 1903, c. 332, 1909, c. 407, provides shall be filed with the insurance commissioner whenever he shall so require in writing upon a claim of such association to be exempt from the provisions of R. L. c. 119, is not made by that statute alone or in connection with R. L. c. 175, § 74, competent as evidence in place of the original. In the present case a document purporting to be a copy of the constitution of an unincorporated foreign beneficiary association, which was held to have been admitted in evidence erroneously, was shown to have been received by the insurance commissioner when requested by him but before the association had made any claim to exemption from the provisions of R. L. c. 119.

INDICTMENT, found and returned in the Superior Court on January 5, 1912, charging that the defendant, in violation of the provisions of R. L. c. 119, § 16, amended by St. 1907, c. 472, and St. 1910, c. 296, on June 11, 1911, solicited and assisted in procuring membership in and aided in the transaction of business for the Order of Owls, an unincorporated organization transacting the business of providing for the payment of benefits in the case of death or disability and not authorized to do such business in this Commonwealth.

The defendant was tried before *McLaughlin*, J. The jury returned a verdict of guilty; and the defendant alleged exceptions, including an exception to the admission in evidence of a document purporting to be a copy of the constitution of the Order of Owls, as well as other exceptions which have become immaterial.

The case was argued at the bar in January, 1913, before *Rugg*, C. J., *Morton*, *Loring*, *Braley*, & *Sheldon*, JJ., and afterwards was submitted on briefs to all the justices.

J. F. Cavanagh, for the defendant.

J. J. Higgins, District Attorney, for the Commonwealth.

LORING, J. The defendant was indicted for a violation of R. L. c. 119, § 16 (amended by Sts. 1907, c. 472, and 1910, c. 296). The first count charged that he "did solicit membership for the Order of Owls, an organization transacting the business of providing for the payments of benefits in the case of death and disability, said Order of Owls not being authorized to do said business in this Commonwealth." There were two further counts charging him with aiding in procuring membership and aiding in the transaction of business for the same order.

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Admittedly the Order of Owls had not conformed to the provisions of R. L. c. 119. The Commonwealth contended that it conducted its business of insurance as a business enterprise and for profit, and for that reason was not exempted from conforming to the provisions of R. L. c. 119. See R. L. c. 119, § 12, amended by Sts. 1903, c. 332; 1909, c. 407; 1910, c. 339. Not having conformed to R. L. c. 119, and not being exempt from so doing, the Order, by R. L. c. 119, § 13, amended by Sts. 1907, c. 471, and 1910, c. 98, was forbidden by R. L. c. 119, § 13 (amended by Sts. 1907, c. 471, and 1910, c. 98), to transact business in this Commonwealth.

For the purpose of proving that the Order of Owls conducted its business of insurance as a business enterprise or for profit, the Commonwealth was allowed to put in evidence what purported to be a copy of its constitution without testimony from a witness that the copy introduced in evidence was in fact a copy of the constitution of that order. Attached to the copy put in evidence was a written statement signed by one Beroth as Supreme Secretary, Order of Owls, that the copy in question was a correct copy of its constitution. But that was hearsay evidence and no more competent than if a witness had testified that Beroth had said that the copy in question was a correct copy.

There is nothing in the record or in the brief of the District Attorney which indicates the ground on which this copy was admitted in evidence. But we assume from the argument of the defendant that it was admitted on the ground that the doctrine put forward in *Commonwealth* v. *Corkery*, 175 Mass. 460, applied to a copy of by-laws filed with the insurance commissioner by a beneficiary organization under R. L. c. 119, § 12, as amended by Sts. 1903, c. 332, and 1909, c. 407. We speak of R. L. c. 119, c. 12, as amended by Sts. 1903, c. 332, and 1909, c. 407, because St. 1910, c. 339, referred to in the defendant's brief had not been enacted when the constitution of the Order of Owls was filed on March 14, 1910. The act under which we assume that the copy of the constitution of the Order of Owls was admitted in evidence provides that the recording officer of any organization claiming an exemption under R. L. c. 119, § 12, shall file with the insurance commissioner a certified copy of its by-laws whenever he shall so require in writing. The

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doctrine put forward in *Commonwealth* v. *Corkery, ubi supra,* was that the statute (St. 1884, c. 330, now R. L. c. 126, §§ 4, 5 and 6) which requires every foreign corporation, except insurance corporations, before transacting business in the Commonwealth to appoint the commissioner of corporations its attorney to accept service of process, and to file with him a copy of its charter, was intended to provide not only for subjecting foreign corporations, except insurance corporations, doing business in the Commonwealth to legal process, but also to provide for ready proof (1) of the fact that they were corporations, and (2) of the terms of their charters. And consequently the copy of the charter so filed was primary evidence for the purposes of this State of the charter of such foreign corporations.

There was a statute like the statute in question in *Commonwealth* v. *Corkery,* which applied to foreign beneficiary corporations when the copy of the constitution of the Order of Owls here in question was filed with the insurance commissioner. That statute was R. L. c. 119, § 13.* It applied to corporations and to corporations only, and did not include foreign beneficiary organizations which, like the Order of Owls, were not incorporated.

But R. L. c. 119, § 12, as amended by Sts. 1903, c. 332, and 1909, c. 407 (under which we assume that the copy of the constitution of the Order of Owls was admitted in evidence in the case at bar), is not a like statute. The provision in question requiring the recording officer of any organization claiming an exemption under R. L. c. 119, § 12, to file with the insurance commissioner a certified copy of its by-laws whenever he so requires in writing, originated in St. 1903, c. 332. From 1877 down the Legislature had by a number of acts regulated the business of fraternal beneficiary organizations. Beginning with 1896, a number of particular fraternal beneficiary organizations had been allowed to transact business in the Commonwealth "without otherwise conforming" to those regulations. See Sts. 1896, c. 136; 1898, c. 474, § 12; 1899, c. 442, § 17; 1901, c. 422, § 17; R. L. c. 119,

* Since the copy of the constitution of the Order of Owls here in question was filed with the insurance commissioner, R. L. c. 119, § 13, has been amended and it now applies to unincorporated foreign fraternal beneficiary associations, as well as to corporations of that nature. See St. 1911, c. 628, § 16.

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§ 12. When further fraternal beneficiary associations were exempted by St. 1903, c. 332, amending R. L. c. 119, § 12, from "otherwise conforming to the provisions of this chapter," the provision here in question was added, namely: "The recording officer of any organization claiming exemption under this section shall file a certified copy of its by-laws with the insurance commissioner whenever he shall so require."

It is manifest that the object of this amendment of R. L. c. 119, § 12, was to give to the insurance commissioner (if in a particular case a beneficiary organization claimed to be exempt under this section from "otherwise conforming to the provisions of" R. L. c. 119) the means of determining whether its claim of exemption was or was not well taken. It was not intended to make a new source of providing evidence for this State of the by-laws of the organizations included in R. L. c. 119, § 12. That act (R. L. c. 119, § 12) applies to domestic as well as to foreign beneficiary organizations in the first place. In the second place the requirement in question is not that all the organizations covered by the section (R. L. c. 119, § 12) shall file their by-laws with the insurance commissioner, but only those required to do so by the insurance commissioner. And finally it is not the charter of the corporations and the articles of agreement of the unincorporated associations which have to be filed, but the by-laws. It is the "by-laws" which are to be filed because it is in the by-laws that the provisions in which the exemptions specified in R. L. c. 119, § 12, would be likely to be found. It could not have been the intention of the Legislature when by St. 1903, c. 332, it added this provision to R. L. c. 119, § 12, to provide that the by-laws of a domestic fraternal beneficiary corporation or association could be proved by producing a copy of its by-laws filed with the insurance commissioner under R. L. c. 119, § 12, as amended by St. 1903, c. 332. And yet if that act is an act within the doctrine of *Commonwealth* v. *Corkery*, 175 Mass. 460, that result necessarily would ensue.

It may be doubted whether the evidence at the trial of the case at bar warranted the judge in admitting this copy, even if a copy filed under R. L. c. 119, § 12, as amended by St. 1903, c. 332, comes within the doctrine of *Commonwealth* v. *Corkery*. Before the copy of the constitution was admitted, the insurance com-

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missioner had testified that he received the copy admitted in evidence in answer to a request made by him upon the secretary for a copy of the constitution. But there had been no evidence at that time that the Order of Owls had claimed that it was exempt from conforming to the provisions of R. L. c. 119. Not only that, but later on the insurance commissioner, in answer to the question: "In consequence of that [its claim of exemption] did he file this by-law, or were they filed before?" testified that it was "filed before." It is plain therefore that the constitution admitted in evidence was not filed by the Order of Owls because it was required to do so by the insurance commissioner as an organization claiming exemption under R. L. c. 119, § 12.

But a majority of the court are of opinion that a copy of by-laws filed with the insurance commissioner under R. L. c. 119, § 12, as amended by Sts. 1903, c. 332, and 1909, c. 407, is not made by that statute alone or in connection with R. L. c. 175, § 74, primary evidence of the by-laws for the purposes of this State, and they have preferred to put their decision on the broader ground.

The entry must be

Exceptions sustained.

THOMAS KELLEY *vs.* COMMONWEALTH.

Worcester. March 11, 1913. — June 16, 1913.

Present: RUGG, C. J., HAMMOND, LORING, SHELDON, & DE COURCY, JJ.

Attempt to commit Crime. Attempt to commit Larceny from the Person. Practice, Criminal, Sentence.

One who was indicted in the Superior Court for an attempt to commit larceny from the person, if he is convicted, can be sentenced under R. L. c. 215, § 6, cl. 2, to confinement at hard labor in a house of correction for a term of thirty months, although, if his prosecution had been begun by a complaint in a police, district or municipal court he must have been sentenced under cl. 3, which restricts the punishment to imprisonment in jail for not more than one year or a fine of not more than $300.

The statutes of this Commonwealth providing for the punishment of the crime of attempting to commit a crime give no undue discretionary power to the courts in regard to fixing the penalty.

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LORING, J. The only errors assigned in this case being errors of law, the questions raised are issues of law and so within the sole jurisdiction of the full court by virtue of R. L. c. 156, § 6. See *Conto* v. *Silvia*, 170 Mass. 152 ; *Perkins* v. *Bangs*, 206 Mass. 408, 413.

There are in form nine assiguments of error. But in effect there is but one, namely, that the sentence imposed upon the plaintiff in error was illegal.

The plaintiff in error was indicted and convicted of an attempt to commit larceny from the person* and was sentenced to confinement at hard labor for a term of thirty months in a house of correction. Such a sentence was attacked and upheld in *Commonwealth* v. *O'Neil*, 188 Mass. 330. See also in this connection *Commonwealth* v. *Cline*, 213 Mass. 225.

It is attacked by the plaintiff in error in the case at bar on a new ground, namely: It was decided in *Commonwealth* v. *Drohan*, 210 Mass. 445, that an attempt to commit larceny from the person is within the jurisdiction of police, district and municipal courts. Under St. 1909, c. 442, which was enacted as a substitute for R. L. c. 160, § 28, those courts can impose the same sentence therefor as the Superior Court in like cases, except imprisonment in the State prison. From this it follows (so the plaintiff in error argues) that an attempt to commit larceny from the person comes within the third clause of R. L. c. 215, § 6, and not within the second clause. That is to say, the crime if completed not being punishable by imprisonment in the State prison, the attempt is punishable only under R. L. c. 215, § 6, cl. 3, by imprisonment in jail for not more than a year or by a fine of not more than $300.

It is to be noted in passing that R. L. c. 215, § 6, cl. 4, has been repealed since the decision in *Commonwealth* v. *O'Neil*, *ubi supra*. See St. 1911, c. 130. The court is not now limited in imposing a punishment for an attempt to a sentence which does not exceed one half the greatest punishment which might have been imposed if the offense attempted had been committed.

It is to be further noted that since the decision in *Commonwealth*

* The crime of which the plaintiff was convicted was alleged and found to have been committed on March 9, 1912. The defendant was sentenced as stated above, and a writ of error was issued dated December 9, 1912.

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v. *O'Neil, ubi supra*, St. 1911, c. 176 (which was enacted before the defendant committed the crime here in question), has given to police, district and municipal courts jurisdiction concurrent with the Superior Court of all felonies punishable by imprisonment in the State prison for not more than five years, and has authorized those courts to impose the same penalties as the Superior Court in like cases except imprisonment in the State prison.

One convicted of larceny from the person, if prosecuted by an indictment, can be sentenced to the State prison for not more than five years. R. L. c. 208, § 24. While if the same defendant is prosecuted for the same offense in a police, district or municipal court, he cannot be sentenced to the State prison at all. It has been settled for years that such a provision is within the power of the Legislature. Chief Justice Shaw, in delivering the opinion of this court in *Jones* v. *Robbins*, 8 Gray, 329, 334, said: "It seems manifest, therefore, that the Legislature did define certain offenses by one general designation, and to a certain extent gave a concurrent jurisdiction to different tribunals, and did provide, that an offense coming under that designation, if conviction was had, and in one of those tribunals, might be punishable by imprisonment one year in the State prison; but if conviction was had before a justice of the peace, it would not be subjected to a State prison punishment." See also *Lewis* v. *Robbins*, 13 Allen, 552.

It follows that if a defendant is indicted for an attempt to commit larceny from the person he can be sentenced under R. L. c. 215, § 6, cl. 2, while he must be sentenced under clause 3 if the prosecution is begun by a complaint.

In addition to the argument which we have just considered, the plaintiff in error has urged that: (1) The decision in *Commonwealth* v. *O'Neil*, 188 Mass. 330, was wrong. We see no reason for disturbing it. (2) A defendant cannot be sentenced to confinement by substitution under R. L. c. 220, § 19, to a longer term than the term directly authorized by R. L. c. 215, § 6, cl. 2. It is not necessary to consider that question in this case because the plaintiff in error was sentenced to confinement in a house of correction and there is no provision in R. L. c. 215, § 6, cl. 2, for confinement in such an institution. And (finally) the plaintiff in error has argued that the statutes as to the sentence which

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can be imposed for the crime of which the plaintiff in error was convicted are in a chaotic condition. If we understand the significance of this argument, it is that the discretion given by the statutes to the court in imposing sentence for this crime is so wide that there is at present no valid statute fixing any punishment for this crime. Without going further it is enough to say that in our opinion there is no undue discretion given to the courts in this connection.

The plaintiff in error should have been sentenced to solitary confinement as well as to hard labor, as was the case in *Lane* v. *Commonwealth*, 161 Mass. 120. R. L. c. 220, § 25. However, the plaintiff in error does not complain of that, and therefore the judgment must be affirmed.

So ordered.

The case was submitted on briefs.

J. M. Sullivan & T. F. Kerrigan, for the plaintiff in error.

J. A. Stiles, District Attorney, *& E. T. Esty*, Assistant District Attorney, for the Commonwealth.

HATTIE S. HATHAWAY, executrix, & another *vs.* RICHARD STONE.

Suffolk. March 13, 1913. — June 16, 1913.

Present: RUGG, C. J., HAMMOND, LORING, SHELDON, & DE COURCY, JJ.

Contract, Building contracts, Construction, Validity. *Referee. Architect. Waiver.*

A building contract contained many provisions making the architect a *quasi* arbitrator to determine whatever questions should arise as to the details of the work to be done and the quality of materials to be furnished. The contractor was to be paid in monthly instalments as the work went on "only upon certificates of the architect," the final payment to be made within thirty days after the completion of the work, and all payments to be due when certificates for them were issued. It was stipulated "that no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials." The contract provided in terms for the submission of certain disputes, if they arose, to the determination of a board of arbitrators, either originally or by appeal from the decision of the architect.

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Held, that, except as to the matters for which determination by a board of arbitrators was provided, the certificate of the architect, made in good faith, as to the amount due upon the final payment was conclusive between the parties.

The objection, that a provision in a building contract, which makes the issuing of the final certificate by the architect conclusive as to the performance of the contract, is void as an attempt to oust the courts of their jurisdiction, is not open after the decision of the architect has been made and the parties have been notified of it without previous objection from either of them.

CONTRACT for a balance of $1,756.50 alleged to be due under a contract in writing dated May 8, 1906, by which the partners of a firm of contractors, doing business under the name of A. Hathaway's Sons, agreed to make certain alterations of and additions to a house of the defendant numbered 365 on Marlborough Street in Boston. Writ dated December 1, 1908.

In the Superior Court the case was heard by *Irwin*, J., without a jury. A change in the parties, made improperly upon the death of one of the plaintiffs, is explained in the opinion. The case had been referred to W. H. H. Emmons, Esquire, as auditor, and the auditor's report was the only evidence introduced at the hearing. The material provisions of the contract are stated in the opinion.

The defendant asked the judge to make certain rulings, among which was the following: "5. The court rules that the final certificate [of the architect], so-called, is not, as a matter of law, conclusive upon the defendant as to the performance of the specifications by the plaintiffs, and did not as a matter of law bind the defendant to the acceptance of either work or materials not in accordance with the contract, and did not as a matter of law preclude him from the recoupment of damages."

The judge refused to make this and other rulings requested by the defendant.

The judge, after stating that the auditor made no finding of fraud or bad faith on the part of the architect or of the parties to the contract, and that the counsel for both parties disclaimed any contention of fraud or bad faith on the part of the architect, made the following ruling: "That the certificate issued by the architect under date of November 30, 1906, being his final certificate under the provisions of the contract, wherein he states that there is due to the plaintiffs the sum of $1,756.50, is conclusive upon

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the question of the rights and liabilities of the parties to the contract; and the plaintiffs are entitled to recover in this action the sum stated in said certificate, with interest from the date of the writ."

The judge found for the plaintiffs in the sum named; and the defendant alleged exceptions.

R. B. Stone, for the defendant.

F. J. Carney, (*W. N. Poland* with him,) for the plaintiffs.

SHELDON, J. After the death of one of the partners by whom the action was brought, and after the auditor's report had been filed, the executrix of the will of the deceased partner came in as a party plaintiff and the case since then has been prosecuted by her and the surviving partner together, instead of the latter alone, as should have been done. *Walker* v. *Maxwell*, 1 Mass. 104. See *Lee* v. *Blodget*, 214 Mass. 374. As, however, no question with regard to this erroneous procedure has been raised by the exceptions, we merely call attention to the matter that it may not be thought to have been approved by the court. For convenience we refer to the contractors as the plaintiff.

By the written contract between these parties, the plaintiff agreed to make certain alterations and additions to the defendant's house for a fixed price, which was to be paid in monthly instalments as the work went on, "only upon certificates of the architect . . . in amounts equal to eighty-five per cent of the value of the work done;" the final payment to be made within thirty days after the completion of the work, and all payments to be due when certificates for the same were issued. It was stipulated by the tenth article of the contract "that no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, and that no payment shall be construed to be an acceptance of defective work or improper materials."

The first question is whether by the terms of the agreement it was left to the architect not only to determine and to state by what have been called "progress" or provisional certificates the value of the work done at the end of each month, but also at the completion of the work or within thirty days thereafter to decide whether the whole work had been properly done, and if so.

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to give his final certificate for the payment of the full contract price. The question must be settled by looking at the whole contract. This is a very inartificial document and one not easy of interpretation; but we are to ascertain from it, as best we may, the real intent of the parties when they executed it, and as far as possible give effect to that intent.

We find in the contract no provision other than what has been stated for the giving of such certificates by the architect. But some parts of the contract do throw light upon the question. It was stipulated that the work should be done under the direction of the architect, and that his decision as to the construction of the drawings and specifications should be final. No alterations were to be made in the work except upon his written order. The plaintiff was to provide at all times facilities for the inspection of the work by the architect or his representatives, was to remove all materials condemned by him, to take down and remove all work condemned by him as unsound or improper, and make good all work damaged or destroyed thereby. The architect was to certify if there was any neglect or refusal on the part of the plaintiff to supply a sufficient force of workmen or a sufficient supply of proper materials, and substantial rights were thereupon to be vested in the defendant and substantial burdens to be imposed on the plaintiff, going so far finally as to allow the defendant to terminate the employment of the plaintiff, to exclude him from the premises, and to complete the work at his, the plaintiff's, risk and even at his expense, if that expense, to be audited and certified to by the architect, should exceed the amount that otherwise would be payable to the plaintiff. The architect was in the first instance to determine whether any and what allowance should be made to the plaintiff if the prosecution or completion of the work should be delayed by the act or default of the owner or of the architect, or otherwise without fault of the plaintiff.

Looking at these stipulations in connection with the provision as to the making of the payments upon certificates to be given by the architect, we are of opinion that the parties intended to make the architect a *quasi* arbitrator to determine whatever questions should arise as to the details of the work to be done, as to the quality of the materials to be furnished by the plaintiff, and as to the character of his work and the condition of the undertaking as it

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was to be completed by the plaintiff. There was no provision that the work should be made satisfactory to the defendant, the owner of the building, or that it should meet his approval when completed. The whole scope and purpose of the contract seem to have been that everything should be done to the satisfaction of the architect, and so as to gain his final approval. He was to stand between the plaintiff and the defendant. It was upon his provisional certificates that partial payments of the contract price, according to the value as fixed by him of what had been done, were to be made by the defendant. It was upon his final certificate that the residue of that price was to be paid. We cannot doubt that all these questions were intended by the parties to be left to the determination of the architect. *Hebert* v. *Dewey*, 191 Mass. 403.

It remains to be decided whether his final decision and the final certificate issued by him, that the plaintiff was entitled to receive, with the adjustments made by him, the unpaid balance of the contract price, were conclusive in this action. As this was the determination, made in good faith by one who stood in the position of an arbitrator, of a matter which both parties had left to his decision, his determination must be conclusive unless the contract otherwise provides. Moreover the provision already quoted, "that no certificate given or payment made . . . except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part," goes far to show the intention that the final certificate (or the final payment, if nothing more were said) should be conclusive, as the final determination of the tribunal selected to pass thereon. We are confirmed in this view by the fact that the contract provides in terms for the submission of certain disputes, if they arise, to the determination of a board of three arbitrators, either originally or by way of appeal from the decision of the architect; but those provisions do not include the subject matter now before us. As to this the decision of the architect is left to be final.

The defendant contends however that the further provision of the tenth article, that "no payment shall be construed to be an acceptance of defective work or improper materials," shows that the final certificate, upon which alone the final payment is

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to be made, was not intended to be conclusive upon this question. He argues that if the final payment is not to bar an action (and a claim for recoupment stands upon the same ground as an action) for defective work or improper materials, the final certificate which is a condition precedent to the final payment can have no greater effect than the payment itself, and so cannot bar the claim which the defendant now makes. The majority of the court cannot accept this reasoning. The tenth article, as we have seen, provides in substance that the final certificate or the final payment made thereunder shall be conclusive. This is then limited as to the effect of the payment merely; the operation of the final certificate is left unaffected and unlimited. This language is wholly satisfied by its effect in relieving the owner from the result of a voluntary payment made without having insisted on the certificate which he might have demanded. The stipulation of the parties was that no payment should be deemed to be an acceptance of defective work or improper materials; we have not the right to add to this a further stipulation which they did not choose to make, that a final certificate followed by a payment shall have no greater effect than a bare payment. When they meant to cover both payments and certificates, as in the earlier part of this tenth article, they said so in their agreement.

Again, this contract, made several years after the decision in *Palmer* v. *Clark*, 106 Mass. 373, was very likely drawn in view thereof. It was settled in that case that such a decision as we have here might be revised and corrected by the *quasi* arbitrator who made it. In that case the amount of filling done under a contract was left by the contract to the decision of an engineer. The engineer made a decision as to that amount and gave a certificate thereof. He afterwards made new measurements, reached a new decision, and gave a new certificate of a different amount, which was relied upon by the plaintiff. The defendant (p. 385) argued that the power of the engineer as arbitrator was exhausted when he gave his first certificate, and that a new award could not be made without the consent of both parties. But the court said (p. 389): "Without doubt he may, within reasonable limits as to time, revise and alter his decision, when it can be done without prejudice to the rights of either party." If in the case at bar the architect had revised and corrected his decision as shown by

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his final certificate, the present difficulty would have been removed. The defendant could then, perhaps, under the language of the contract last quoted, have maintained an action upon the claim now set up in recoupment, even though, before the new decision of the architect, he had made full payment of the contract price. As the matter now stands, we cannot avoid the conclusion that the ruling of the Superior Court was right.

The defendant has relied upon the language used in *Norcross Brothers Co.* v. *Vose*, 199 Mass. 81, 95, that, even if the architect's indorsement were "given effect as a certificate, the architect's approval did not bind the defendant to the acceptance of either work or material not in accordance with the contract or preclude him from the recoupment of damages." But the court there was speaking of a "progress" or provisional certificate. It already had been held that the indorsement was not a final certificate, and the court added in effect that regarded as a provisional certificate it could not have the effect claimed. See also *National Contracting Co.* v. *Commonwealth*, 183 Mass. 89; *White* v. *Abbott*, 188 Mass. 99; *Loftus* v. *Jorjorian*, 194 Mass. 165; *Handy* v. *Bliss*, 204 Mass. 513.

The defendant contends also that the contract, construed as we have construed it, is void as being an attempt to oust the courts of their jurisdiction. We need not consider whether this claim originally could have been availed of. It comes too late, after the decision of the architect has been made and published without previous objection by either party. *Norcross* v. *Wyman*, 187 Mass. 25, 27.

Exceptions overruled.

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GEORGIANNA JOHNSON & another *vs.* EUGENE W. STONE, administrator.

Essex. May 22, 1913. — June 16, 1913.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DE COURCY, JJ.

Landlord and Tenant. Executor and Administrator.

In an action against an administrator on a covenant to pay rent contained in a lease from the plaintiff to the defendant's intestate, it is no defense that before the rent accrued the defendant obtained a responsible person ready to accept an assignment of the lease whom the plaintiff refused to accept as a tenant, the obligation to pay rent being terminable only by a surrender of the lease accepted by the lessor.

CONTRACT, against an administrator, for $300 upon a covenant to pay rent contained in a lease from the plaintiffs to the defendant's intestate dated April 15, 1907, for the term of five years from May 15, 1907. Writ in the Police Court of Lynn dated May 1, 1911.

On appeal to the Superior Court the case was tried before *Bell*, J. It appeared that the lease was in the ordinary form and contained a covenant of the lessee "not to lease, nor underlet . . . but with the approbation of the lessors or Chase and Lunt, agents, thereto, in writing, having been first obtained;" that the defendant's intestate died in September, 1909, and that the defendant was appointed administrator in January, 1910. The defendant relied on a defense, set up in his answer, that the plaintiffs had prevented the defendant from making an assignment of the leased premises. The defendant made an offer of proof as follows:

"The defendant offers to show that the defendant entered into negotiations with a man who was of sufficient financial responsibility to be acceptable as a tenant by a prudent landlord, whereby that man was willing and stood ready to take from the defendant an assignment of the two leases * in question;

* There was a second action on another similar lease. The cases appear to have been tried together.

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that, further, the plaintiffs and their agents acting for them stated to that man that they would not recognize the proposed assignment as entitling the man to any rights in the property covered by the leases if that assignment were actually made and that by reason of those statements made by the plaintiffs and their agents the man in question declined and refused to accept the proposed assignments and would have nothing further to do with the matter, and that, further, the defendant thereupon gave to the plaintiffs the keys of the premises and notified them that he considered himself to be discharged from further liability under the leases by reason of the statements made by the plaintiffs whereby the man in question was caused to refuse to take the assignments."

It was agreed that the redelivery of the keys was not an acceptance of a surrender of the lease.

The judge ruled that the facts stated in the offer of proof would not constitute a defense to the action, and, there being no dispute as to the other matters involved in the case, ordered a verdict for the plaintiffs for the amount claimed. The defendant alleged exceptions.

The case was submitted on briefs.

R. E. Burke & E. E. Crawshaw, for the defendant.

W. H. Niles & E. S. Underwood, for the plaintiffs.

BRALEY, J. By the death of the lessee during the term, the leasehold became personal assets of his estate, and the restrictive covenant not to lease, nor underlet, nor permit any other person or persons to occupy or improve the premises but with the approbation of the lessors thereto in writing having been first obtained, while binding the lessee, did not prevent the leasehold interest from passing to the defendant as the administrator of his estate. *Smith* v. *Putnam*, 3 Pick. 221, 223. *Bemis* v. *Wilder*, 100 Mass. 446. *Squire* v. *Learned*, 196 Mass. 134, 136.

But the defendant's offer of proof, that he obtained a purchaser ready to accept an assignment, but who afterwards withdrew because the plaintiffs refused to recognize him as a tenant, affords no defense, and was rightly excluded. If the sale had been perfected by an assignment, the defendant still would have been liable by privity of contract under the intestate's covenant to pay the rent for the amount shown by the stipulations of the parties, although the assignee also might have been bound through

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privity of estate. *Way* v. *Reed*, 6 Allen, 364, 368, 369. *Hovey* v. *Newton*, 11 Pick. 421. *Bradford* v. *Patten*, 108 Mass. 153. *Greenleaf* v. *Allen*, 127 Mass. 248. *Deane* v. *Caldwell*, 127 Mass. 242. *Donaldson* v. *Strong*, 195 Mass. 429, 431, and cases cited. Nor would the acceptance of rent from the assignee bar an action against the defendant for rent subsequently accruing and remaining unpaid. *Way* v. *Reed*, 6 Allen, 364, 368, 369. *Greenleaf* v. *Allen*, 127 Mass. 248. The defendant could be relieved only by a surrender of the remainder of the term unconditionally accepted by the lessors, and in the absence of such evidence the judge properly ordered a verdict for the plaintiffs. *Deane* v. *Caldwell*, 127 Mass. 242.

Exceptions overruled.

CHARLES P. WEBBER & others, trustees, *vs.* JAMES T. LANDRIGAN, trustee.

Suffolk. January 10, 1913. — June 17, 1913.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Equitable Restrictions.

A purchaser of a tract of land facing on a street in a city divided it into six lots. Three of these lots he conveyed with a restriction in each deed that all buildings thereafter erected thereon should be set back on a line with the building then thereon. Two other of the lots he conveyed with the restriction that all buildings erected thereon should be set back at least ten feet, excepting that a circular front might project two feet and six inches farther. The sixth lot he conveyed last, subject to no restriction. None of the deeds referred to any plan showing that the lots were subject to restrictions and none of them expressed any intent to benefit the other lots by the restriction. *Held*, that no general scheme was established by the common grantor, on which to found a right in the owner of one of the lots to enforce in equity the restriction imposed on the holder of another of the lots by his deed or the deed of a predecessor in title.

MORTON, J. This is a petition brought in the Land Court by the trustees under the will of John P. Webber, late of Brookline, to register and confirm their title to a certain lot of land situated at the corner of Shawmut Avenue and Worcester Street in Boston. The petitioners seek to register their title free, so far as the respond-

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ent is concerned, from certain restrictions which appear of record in the deeds of their predecessors in title and which the respondent as the owner of the adjacent lot seeks to enforce against them. The lot belonging to the petitioners and that belonging to the respondent constitute parts of a larger tract conveyed by the city of Boston to H. Hollis Hunnewell by deed dated June 26, 1855, and recorded July 16, 1855, and subdivided by him into six lots; and the question submitted to the Land Court was whether upon all the evidence as matter of law a general scheme was established by Hunnewell which created an equitable easement for the benefit of the respondent. The Land Court found that no such general scheme was contemplated or established, and ordered a decree for the petitioners free from restrictions. The respondent excepted to this finding and order.

We think that the ruling of the Land Court * was right. Three of the six lots into which the tract was subdivided by Hunnewell were conveyed by him subject to similar restrictions, namely, "that all buildings that may hereafter be erected on said premises shall set back from Worcester Street on a line with the building now erected thereon." Two were conveyed subject to different restrictions, namely, "that all buildings that shall be erected on the premises, shall set back from Worcester Street, at least ten feet, excepting however that in case circular front buildings shall be placed thereon; this restriction shall not prevent the building the circular part of said front in front of said line of ten feet; provided however that the projection or swell made by said circle shall not be more than two feet, six inches from the line last mentioned, viz.: ten feet back from Worcester Street." And the sixth and last lot was conveyed subject to no restrictions. It is true that this was conveyed to a Mr. Pratt who had been Hunnewell's confidential man of business for fifty years and who drew his deeds, and that when Pratt conveyed it a year later the deed contained a restriction similar to that in the first three deeds. But there is nothing to show that Hunnewell had anything to do with the insertion of the restriction or that the conveyance by him to Pratt was not an absolute conveyance, and it is manifest, we think, from the original deeds that no general plan or scheme in

* Made by *Davis*, J.

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regard to restrictions was contemplated or established by Hunnewell. No doubt it was expected that the restrictions would benefit the premises which were subjected to them, and a common advantage to all of the lots may thus have been anticipated. But that is far from establishing a general scheme or plan. *Noyes* v. *Cushing*, 209 Mass. 123. The difference in the restrictions cannot be regarded, we think, as unimportant, nor the conveyance of the sixth lot without restrictions as an insignificant circumstance and so as bringing the case within *Hano* v. *Bigelow*, 155 Mass. 341, and *Bacon* v. *Sandberg*, 179 Mass. 396.

In addition to the difference in the restrictions in the two groups of original conveyances in which restrictions were inserted and the conveyance of the sixth lot without restrictions, it is to be noted that there was no plan by Hunnewell showing that the lots were subject to restrictions, and there is no language in the deeds under which the petitioners and respondent respectively claim from which any intent can be gathered to annex the benefit of the restrictions to which the petitioners' lot is subject to the premises belonging to the respondent, both of which were deemed matters of some importance by Bigelow, C. J., in *Badger* v. *Boardman*, 16 Gray, 559. Besides the cases referred to above see *Donahoe* v. *Turner*, 204 Mass. 274; *Dana* v. *Wentworth*, 111 Mass. 291; *Sharp* v. *Ropes*, 110 Mass. 381; *Jewell* v. *Lee*, 14 Allen, 145.

Exceptions overruled.

The case was submitted on briefs.

J. A. Curtin, for the petitioners.

J. R. Murphy & D. H. Fulton, for the respondent.

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ANDREW GIACCOBE *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. January 15, 16, 1913. — June 17, 1913.

Present: RUGG, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Negligence, Street railway, In use of highway.

It does not show negligence as matter of law on the part of a boy seven years and eight months of age, that he attempted to cross a street in front of an electric street railway car, which he saw coming slowly two hundred and fifty feet away, when he thought that he could "get by;" nor does it as matter of law show such negligence, that, when he was between the rails of the track and was startled by the ringing of a bell and looked up and saw the car fifteen or twenty feet away approaching at great speed, he tried to get back but could not and the car struck him.

TORT for personal injuries sustained by a boy seven years and eight months of age from being struck by a street railway car operated by the defendant on Cambridge Street in that part of Boston called Charlestown on July 27, 1909. Writ dated August 30, 1909.

In the Superior Court the case was tried before *Pratt*, J. The facts which could have been found upon the evidence are stated in the opinion. At the close of the evidence the judge ordered a verdict for the defendant, and by agreement of the parties reported the case for determination by this court. If the ordering of the verdict was right, judgment was to be entered for the defendant; if the ordering of the verdict was wrong, judgment was to be entered for the plaintiff in the sum of $4,200.

C. H. Donahue, (*W. P. Meehan* with him,) for the plaintiff.

F. Ranney, (*T. Allen, Jr.*, with him,) for the defendant.

MORTON, J. It is not contended that the plaintiff was not rightfully in the street. He was seven years and eight months old at the time of the accident, and for two years had been crossing the tracks four times daily, on his way to and from school, unattended "except that sometimes the neighbors' children went with him," and he was of average intelligence. Neither do we understand the defendant to contend that there was no evidence of negligence on the part of the motorman. His view was unob-

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structed, and that, together with the speed at which it could be found that he suffered the car to run and his failure to sound the gong or warn the plaintiff until he was only fifteen or twenty feet away from him, warranted a finding that he was negligent. *Breen* v. *Boston Elevated Railway*, 211 Mass. 519.

The question of difficulty is that relating to the plaintiff's due care. But we think that there was evidence warranting a finding in his favor. He was required to exercise only such care as naturally would be expected of a child of his age and experience. He testified in part that "he started from the curbstone, then got half way between the first rail and the curbing and looked up and saw [the] car coming down slow, and thought he had a chance to get by. That he walked on to the other rail going down toward Sullivan Square, looked down to see if any cars were coming down, heard the bell ring and looked up the other way and saw a car and tried to get back but couldn't; the car struck him. That when he heard the bell he looked up and was scared. . . . When he first looked up he was halfway between the curbstone and the rail of the track on which cars go out from Sullivan Square. That when at that point he saw the car coming off the bridge, that it was then going slow. That when he looked down toward Sullivan Square he was in the middle of the inbound track, . . . the track on which he got hurt. . . . That the bell rang loud when he first heard it. That he then tried to get back, that he took a step back. That he was walking when crossing the street and did not run at all. That when he got half way over as described, he went a little faster, still walking." There was evidence tending to show that the bridge referred to was upwards of two hundred and fifty feet away; that the grade from the bridge was a down grade; that after the car passed the bridge it began to go faster and kept going faster until, as one witness described it, it was "going very fast," and as another witness said, "the car was coming down the hill at about fifteen or sixteen miles an hour;" and that "after hitting the plaintiff the car went one hundred and twenty-five feet or so before it stopped." Bearing in mind that only such care was to be expected of the plaintiff as naturally would be exercised by a child of his age, we think that it cannot be said as matter of law that when he saw the car coming slowly two hundred and fifty feet away he was not in the

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exercise of due care in thinking that he could "get by" and in making the attempt. If the car had come slowly all the way it seems pretty plain that he would have got across safely. In *O'Toole* v. *Boston Elevated Railway*, 211 Mass. 517, it was held that an adult seeing a car approaching three hundred feet away was not careless in not looking again and in assuming that the car would not rur so rapidly as to hit him in crossing the street. It certainly cannot be said that the plaintiff was careless in making the same assumption under similar circumstances. His conduct when he was startled by the ringing of the bell and saw that the car was only a short distance away was such as, it could be found, naturally might be expected of a child of his age. The case differs from *Holian* v. *Boston Elevated Railway*, 194 Mass 74, relied on amongst others by the defendant, where the car was only eighty feet away and the plaintiff walked across the street directly in front of it without taking any precautions for her safety. See *Breen* v. *Boston Elevated Railway*, 211 Mass. 519; *Purcell* v. *Boston Elevated Railway*, 211 Mass. 79; *McDermott* v. *Boston Elevated Railway*, 184 Mass. 126; *Burns* v. *Worcester Consolidated Street Railway*, 193 Mass. 63.

It follows that in accordance with the terms of the report judgment should be entered for the plaintiff for $4,200.

So ordered.

CLARK PARKER *vs.* NEW ENGLAND TRUST COMPANY, executor & trustee, & others.

Suffolk. January 20, 1913. — June 17, 1913.

Present: RUGG, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Compromise, Of controversy as to will. *Equity Jurisdiction*, To enforce compromise agreement.

It seems, that a bill in equity cannot be maintained to compel one who is named as executor and trustee in an alleged will, the proof of which is pending in the Probate Court, to administer the property of the estate of the alleged testator in accordance with an agreement of compromise, because unless the will is allowed there can be no compromise concerning it.

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In a proceeding under R. L. c. 148, §§ 14, 15, asking the Supreme Judicial Court to authorize a compromise of a controversy as to the estate of a testator, where a certain person is named in the will as executor and trustee and by the terms of the proposed compromise is not to be made trustee, such person is a necessary party to the agreement of compromise.

Although, apart from the provisions of R. L. c. 148, §§ 14–18, this court has jurisdiction in equity to enforce a compromise agreement in regard to property acquired under a will between parties who are *sui juris* and where no contingent interests are affected, this jurisdiction does not extend to the enforcement of an alleged compromise agreement affecting future contingent interests.

BILL IN EQUITY, filed in the Supreme Judicial Court on January 12, and amended on March 12, 1912, by one of the next of kin and heirs at law of Benjamin W. Parker, who died on December 12, 1910, alleging that objection had been made by such next of kin to the allowance of an instrument purporting to be the will of Benjamin W. Parker, that an agreement of compromise had been executed by such next of kin and certain persons named as legatees in such alleged will, and that the New England Trust Company, which was named as executor and trustee in such alleged will had refused to present such agreement of compromise to the court and to ask authority to adjust the controversy in accordance with such agreement; praying that such trust company might be authorized and directed to adjust the controversy as to the allowance of such will in accordance with the terms of such agreement of compromise, and that it might be directed to settle the estate of Benjamin W. Parker in accordance with such agreement.

There were annexed to the bill a copy of the alleged will dated June 8, 1910, and a copy of the alleged agreement of compromise dated June 27, 1911.

The New England Trust Company filed a plea, alleging that it was named as executor and trustee in a document purporting to be the last will of Benjamin W. Parker, and setting forth as reasons why the bill should be dismissed (1) that the court had no jurisdiction to grant the relief prayed for because that defendant was not a party to the alleged agreement of compromise as required by R. L. c. 148, §§ 14, 15, and acts in amendment thereof; (2) that the court had no jurisdiction to compel a person named as such executor to adjust by arbitration or compromise such a controversy; (3) that the bill was premature, because the

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document purporting to be the will of Benjamin W. Parker had not been proved in the Probate Court, that the petition for its allowance was still pending and no date had been set for a hearing; (4) that by certain provisions of the alleged will, there set forth, contingent interests were created so that the court had jurisdiction to give effect to any agreement of compromise only by virtue of the provisions of R. L. c. 148, §§ 14–18, and acts in amendment thereof, and that it appeared that the requirements of the statute had not been fulfilled.

The two other defendants, being persons named as legatees in the alleged will who had not signed the alleged agreement of compromise, filed a similar plea.

The case was heard upon the pleas by *Hammond*, J., who made an order, that the pleas, so far as they alleged want of jurisdiction either under the statute or under general equity jurisdiction, were adjudged good. Thereafter he made a final decree that the pleas to the jurisdiction be sustained and that the bill be dismissed. The plaintiff appealed.

R. M. Morse, (*S. K. Paige* with him,) for the plaintiff.

G. F. Ordway, for the defendant, Frederick P. Gay.

M. J. Dwyer, (*G. P. Hyde* with him,) for the New England Trust Company.

MORTON, J. This is a bill praying that the New England Trust Company be authorized and directed as executor and trustee under the will of Benjamin Parker, late of Boston, to adjust a controversy in regard to said will according to the terms of a compromise agreement which has been entered into between the next of kin and heirs at law of said Parker. The plaintiff is a brother of the testator. The will, though offered for proof in the Probate Court for the county of Suffolk, has not yet been allowed, and a petition for its allowance is now pending in that court. *Non constat* that the will may ever be allowed. And, if the will should not be allowed, there would be nothing to compromise in respect thereto, and the bill would seem therefore to be premature.

Still further, the statute provides, if this is to be regarded as a proceeding under the statute, that in regard to a compromise "the persons named as executors, or the administrators with the will annexed, as the case may be, those claiming as devisees or

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legatees whose interests will in the opinion of the court be affected by the proposed . . . compromise, and those claiming the estate as intestate, shall be parties." R. L. c. 148, § 15. In the present case the New England Trust Company, which is named as executor and trustee and which by the terms of the proposed compromise is to be eliminated as trustee, is not a party to the compromise, as it is expressly required by the statute that it should be.

The plaintiff relies upon *Blount* v. *Wheeler*, 199 Mass. 330. But in that case there were not, as in this, future contingent interests to be affected by the proposed compromise. There is no doubt that since the statute as well as before, the court has jurisdiction in equity to enforce a compromise agreement as an agreement voluntarily entered into where all the parties are *sui juris* and no contingent interests will be affected. *Abbott* v. *Gaskins*, 181 Mass. 501. But this is not such a case.

Decree affirmed with costs.

MARCUS S. LURIE *vs.* NATHAN PINANSKI.

Suffolk. January 22, 1913. — June 17, 1913.

Present: RUGG, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Equity Jurisdiction, Coming into court with clean hands, Accounting between partners, Constructive trust. *Partnership.*

In a suit by a member of a partnership, consisting of the plaintiff, the defendant and a third person, for an accounting by the defendant for an option taken by the defendant in his own name for an extension of a lease held by the partnership, which option the defendant sold, appropriating the proceeds to his own use, where it appears that the option was acquired by the defendant as partnership property and thus was impressed with a trust in favor of the plaintiff and the third partner and also that the plaintiff furnished a part of the consideration for the purchase of the option, it is no defense to the plaintiff's right to an accounting, that before the defendant purchased the option for the renewal of the lease, the plaintiff attempted without success to get a lease of the premises for himself without the knowledge of his copartners, because the plaintiff's attempt to circumvent his copartners was not a part of the transaction for which the defendant is called to account and does not prevent the plaintiff, as to that transaction, from coming into court with clean hands.

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MORTON, J. This is a bill in equity for an accounting in respect of a partnership, consisting of the plaintiff, the defendant and one Silverman, in relation to certain leasehold interests. The case was sent to a master who made a report in favor of the plaintiff. A decree was entered* confirming the report and ordering the defendant to pay to the plaintiff the sum of $1,041.60, with costs of suit. The defendant appealed.

The principal contention of the defendant is that the plaintiff is not entitled to relief because he himself at one time, according to the findings of the master, "asked the lessor," "without the knowledge or consent of the defendant or Silverman," "for a new lease of the Brooks' estate in his own name at an increased rent." In other words, the defendant contends that the plaintiff does not come into court with clean hands. But, to quote from *Dering* v. *Winchelsea*, 1 Cox, 318, 319, though a man must come into equity with clean hands, "when this is said, it does not mean a general depravity; it must have an immediate and necessary relation to the equity sued for." In the present case, there was no such immediate and necessary relation between what the plaintiff did or attempted to do and what the defendant did as to render the principle applicable. If the plaintiff and the defendant had confederated together to have the defendant obtain a renewal of the lease in his own name without the knowledge of and to the exclusion of Silverman, with the agreement that any profits resulting therefrom should be divided between the plaintiff and the defendant, and the defendant for some reason had concluded to pay Silverman what would have been his share of the profits and had refused to pay the plaintiff and the plaintiff had brought a bill for an accounting, a case would have been presented for the application of the principle. But the present is not such a case. What the plaintiff did was to attempt without success to get a lease for himself without the knowledge of his copartners. And though his conduct shows a readiness on his part to circumvent his copartners if he could, that does not bring the case within the principle referred to. See *Lawton* v. *Estes*, 167 Mass. 181; *Snow* v. *Blount*, 182 Mass. 489.

Amongst other things on which the defendant relies is the statute

* In the Superior Court by order of *Pierce*, J. The master was William S. Dana, Esquire.

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of frauds. It is manifest that that has nothing to do with the case. Besides it is not pleaded. The master having found that the plaintiff and defendant were partners, the defendant stood in a fiduciary relation to the plaintiff and could not clandestinely take (as the master has in effect found that he did take) a renewal of the lease for his own benefit. *Leach* v. *Leach*, 18 Pick. 68, 76. The option was clearly impressed with a trust in favor of the plaintiff. In addition to the trust arising out of the fiduciary relation created by the partnership, a part of the consideration for the option was furnished by the plaintiff under and pursuant to an understanding between the lessor and lessees, as the master has found that the lessees should have an extension of the lease. Under such circumstances, for the defendant to take the option in his own name and attempt to appropriate the profits thereof to his own use constituted not only a breach of trust but a fraud upon his copartners.

Decree affirmed with costs.

E. Greenhood, for the defendant.

C. S. Hill, for the plaintiff.

FRANKLIN SAVINGS BANK *vs.* INTERNATIONAL TRUST COMPANY.

Suffolk. March 12, 13, 1913. — June 17, 1913.

Present: RUGG, C. J., HAMMOND, LORING, & DE COURCY, JJ.

Municipal Corporations, Officers and agents. *Bills and Notes. Bank. Conversion.*

The treasurer of a town has no authority to indorse for circulation a check payable to the order of the town.

If a check payable to the order of a town is indorsed in blank in the name of the town by the treasurer of the town and is deposited in a bank by one of the bank's customers not connected with the town, this is notice to the bank of a defect in the title of the depositor, and, if the bank pays out the proceeds of the check upon drafts of the depositor and the town receives no part of such proceeds, this is a conversion for which the bank is liable to the drawer of the check.

CONTRACT OR TORT for $24,122.22, the amount with interest of a check drawn by the plaintiff upon the Second National Bank of Boston payable to the order of the town of Framingham, the

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declaration containing two counts, the first for the alleged conversion of the check, and the second for money had and received. Writ dated December 8, 1911.

In the Superior Court the case was tried before *Sanderson*, J. It appeared that the check was indorsed "Town of Framingham, by John B. Lombard, Treasurer," and thus indorsed was presented, on November 30, 1908, to the receiving teller of the defendant by the American Banking Company, a depositor and customer of the defendant, for deposit, and was credited to its account. On December 1, 1908, the defendant through the clearing house collected the amount of the check from the Second National Bank of Boston, and the proceeds of the check were drawn out by the American Banking Company. The check in question was given by the plaintiff on November 30, 1908, to one Mead in payment for what purported to be a note of the town of Framingham for $25,000 issued in anticipation of the taxes for the year 1908. The plaintiff had on two former occasions bought from Mead notes of the town of Framingham, and they had been paid at maturity. The note for which the plaintiff gave the check was not authorized by the town, the signatures of the two selectmen upon it were forged, and the town did not receive the proceeds of the check; but these facts were not known to the plaintiff at the time of the transaction. John B. Lombard wrote the indorsement upon the check and was treasurer of the town of Framingham at the time that he did so.

Against the defendant's exception the judge ordered a verdict for the amount of the check with interest from the date of the writ, the plaintiff claiming interest from December 1, 1908, the time of the alleged conversion. By agreement of the parties, the judge reported the case. If his ruling that the plaintiff was entitled to recover was correct, judgment for the plaintiff was to be entered for the amount of the check with interest from the date of the writ, unless it should be held that the plaintiff was entitled to interest from December 1, 1908, in which case judgment was to be entered for the plaintiff for the amount of the check with interest from that date. If the ruling was wrong, judgment was to be entered for the defendant, unless upon the evidence there was a question of fact for the jury, in which event the case was to stand for trial in the Superior Court.

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M. Storey & R. G. Dodge, for the plaintiff.

R. M. Morse, for the defendant.

HAMMOND, J. In view of the decisions of this court as to the powers conferred by law upon a town treasurer, this seems a simple case. The check was made payable to the town of Framingham and could be put into circulation only by the indorsement of the town acting by its agent duly authorized for that purpose. The only indorsement in the name of the town was made by Lombard, the treasurer, in these words: "Town of Framingham, by John B. Lombard, Treasurer." But he as treasurer had no power to indorse the check for circulation. His only power was to indorse it for deposit for collection to the account of the town. The check was not received for deposit on account of the town, but on account of the American Banking Company, one of the defendant's depositors, to which on the same day the defendant gave a certified check for an amount which included very nearly the whole amount of the check in question.

The infirmity in the title of the American Banking Company to the check was thus apparent upon the check itself with the indorsement, when interpreted under the law, and the defendant must be held to have had knowledge of it. Having taken the check with such knowledge it is answerable to the plaintiff for the proceeds. The case is clearly distinguishable from *Fillebrown* v. *Hayward*, 190 Mass. 472, upon which the defendant places much reliance. The treasurer in that case was treasurer of a private corporation, not of a town. The distinction between the general powers of these two officers as to commercial paper has been frequently stated by this court. For cases illustrative of the law applicable to the present case see *Smith* v. *Cheshire*, 13 Gray, 318; *Lowell Five Cents Savings Bank* v. *Winchester*, 8 Allen, 109; *Abbott* v. *North Andover*, 145 Mass. 484, and cases cited; *Newburyport* v. *Fidelity Mutual Life Ins. Co.* 197 Mass. 596. See also *Holden* v. *Phelps*, 135 Mass. 61.

The principle also invoked by the defendant that where one of two innocent parties must suffer, the loss must rest where it falls, is for manifest reasons not applicable.

There was no prejudicial error in the admission of the evidence relating to the purchase of the note by the plaintiff and the making and negotiation of the check in payment therefor. The check was

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wrongfully received by the defendant, who was guilty of conversion on that day. By the terms of the report there should be judgment for the plaintiff, with interest from December 1, 1908.

So ordered.

FREDERICK R. SEARS & others, executors, *vs.* INHABITANTS OF NAHANT.

Essex. March 14, 1913. — June 17, 1913.

Present: RUGG, C. J., HAMMOND, LORING, SHELDON, & DE COURCY, JJ.

Tax, Abatement. *Practice, Civil*, Costs, Counsel fees. *Words*, "Expenses."

Review by HAMMOND, J., of statutory provisions for the payment of costs and expenses in proceedings for the abatement of taxes.

Review by HAMMOND, J., of the leading cases in which this court has had occasion to consider whether the word "expenses" as used in a statute was or was not intended to include counsel fees.

A proceeding upon a petition in the Superior Court under R. L. c. 12, § 78, appealing from the refusal of the assessors of a city or town to abate a tax, is in the nature of an action at law.

It is provided by R. L. c. 12, § 81, (now St. 1909, c. 490, Part I, § 80,) that, in a proceeding upon a petition in the Superior Court appealing from the refusal of the assessors of a city or town to abate a tax, "if no abatement is granted, judgment shall be rendered for the city or town for its expenses and costs, which shall be taxed by the court." *Held*, that this provision does not authorize the taxation of counsel fees paid by a town in favor of which a judgment is rendered on a refusal to grant an abatement.

PETITION, filed in the Superior Court on March 1, 1909, under R. L. c. 12, § 78, appealing from the refusal of the assessors of the town of Nahant to abate a tax assessed to the petitioners as the executors of the will of Frederick R. Sears.

The case was heard by *Crosby*, J., who found that the petitioners were entitled to no abatement, and reported the case for determination by this court, who in a decision, reported in 205 Mass. 558, held that the petition should be dismissed, and, in accordance with the terms of the report, ordered that judgment should be entered for the respondent with such costs and expenses as it might be entitled to, to be taxed in the Superior Court.

Thereafter the respondent made a motion in the Superior Court

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that its costs and expenses be taxed. The motion was heard by *Crosby*, J. The respondent offered evidence, which was not disputed, that it had expended more than $7,500 as counsel fees and also the sum of $227.63 for stenographers' bills, printing and other expenses.

The judge ruled that the counsel fees were not taxable against the petitioners under R. L. c. 12, § 81, now St. 1909, c. 490, Part I, § 80. He found and ruled that the respondent as part of its costs and expenses was entitled to have its ordinary costs taxed by the clerk as in the usual civil actions at law. He also allowed as a part of the respondent's expenses the payments amounting to $227.63, mentioned above. The respondent alleged exceptions to the ruling of the judge above stated.

It was agreed by the parties that, if the respondent's exceptions were overruled, judgment was to be entered for the respondent in the sum of $227.63 "in addition to ordinary taxable costs in the original case, but not including any further sum for the cost of printing the brief in said case." The other stipulations of the parties have become immaterial.

P. Nichols, for the respondent.

B. E. Eames, for the petitioners.

HAMMOND, J. In this proceeding upon a petition brought in the Superior Court for the abatement of a tax, no abatement was granted; and the main question is whether counsel fees are to be allowed to the respondent town. The decision depends upon the construction of R. L. c. 12, § 81 (now St. 1909, c. 490, Part I, § 80), which so far as material reads as follows: "If, upon a hearing, the court finds that the complainant has complied with all the provisions of law and has paid the tax, . . . it may grant him a reasonable abatement, and shall render judgment against the city or town for the amount thereof, and for all charges and interest on the amount of the abatement from the date of the payment of the tax. The court may also, if the complainant has filed a list of his estate as required, . . . allow him costs in its discretion. If no abatement is granted, judgment shall be rendered for the city or town for its expenses and costs, which shall be taxed by the court." If the word "expenses," as used in this statute, includes counsel fees, the question must be answered in the affirmative; otherwise in the negative.

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Although from early times there always have been provisions for the abatement of taxes (Anc. Chart. 70, 250, 475, 610; St. 1785, c. 50, § 10; Rev. Sts. c. 7, §§ 37, 38, 42; Gen. Sts. c. 11, §§ 45–48; Pub. Sts. c. 11, § 71), still, until St. 1882, c. 218, neither the assessors nor the county commissioners could allow costs to either party. *Lowell* v. *County Commissioners*, 6 Allen, 131. This last statute provides that when an abatement is made the county commissioners may make such order relating to the payment of costs as justice may seem to require, provided, that costs shall not be allowed to one who has failed to file the list required by law. This statute provides for costs only in cases where an abatement is made. There seems to be no statute, even up to the present time, which authorizes the county commissioners to make an order as to costs in cases where no abatement is made.

The statutes authorizing appeals by the taxpayer from the assessors to the county commissioners are still in force and are frequently invoked. By St. 1890, c. 127, an additional remedy was given to the taxpayer by an appeal to the Superior Court. Here the case is tried by a judge without a jury, and either party may take exceptions to the rulings and decisions of the judge upon questions of law arising upon the trial, in the same manner and with the same effect as in other cases there tried without a jury. The object of the statute seems to have been to give to the taxpayer the right at his option to have his case heard by a tribunal likely to be more learned in the law than the county commissioners, and where the questions of law can be more directly and expeditiously raised and settled. Since the passage of this statute he may appeal either to the county commissioners or the Superior Court at his option. If he appeals to the first, costs at the discretion of the tribunal may be taxed in case an abatement is made, but never if an abatement is refused. If he appeals to the second, then in case the abatement is refused there is to be judgment against him in favor of the city or town for "its expenses and costs, to be taxed by the court." There is no trial by jury in either tribunal.

The question whether counsel fees are included in this word "expenses" is a narrow one, and yet its solution is attended with some difficulty. As was said by Rugg, C. J., in *Burrage* v. *County of Bristol*, 210 Mass. 299, 300, "The word 'expenses,' although

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broad enough to include counsel fees, is of varying significance, dependent upon the connection in which it is used."

The word seems to have been early used in the statutes concerning trustee process. By St. 1794, c. 65, § 3, a trustee under certain circumstances was allowed his legal costs, and such further costs as with his legal costs should under all the circumstances of the case be a reasonable compensation to him "for his time and expenses, in appearing and defending himself against such suit." This was amended in St. 1829, c. 128, § 2 (passed March 13, 1830), so as to read "an amount sufficient to pay his reasonable counsel fees, and other necessary expenses." In Rev. Sts. c. 109, § 49, the phrase is "his costs for travel and attendance, and such further sum as the court shall think reasonable, for his counsel fees and other necessary expenses." And substantially in this last form has the provision continued to the present time. In R. L. c. 189, § 67, the phrase is, "costs for travel and term fees, and such further amount for counsel fees and other necessary expenses as the court may allow." It is obvious that if the word "expenses" as used in St. 1794, included counsel fees, there was no need of the amendment made by St. 1829, nor of the retention of both terms in the subsequent statutes.

St. 1842, c. 222, giving to the Hadley Falls Company authority to construct a dam across the Connecticut River, provided that the corporation should pay damages suffered by owners of fishing rights. The damages, upon the application by either party, were to be assessed by the county commissioners subject to an appeal to a jury, as in the case of land taken for a highway; "and all expenses accruing under such application to, and determination of, the county commissioners, shall be borne by the Hadley Falls Company." This court, after saying that "we should allow a liberal taxation for all expenditures for plans, surveys," etc., added however these words: "We cannot suppose that the Legislature intended to embrace counsel fees in the above provision, and the claim . . . [for counsel fees] must therefore be disallowed." *Marshall Fishing Co.* v. *Hadley Falls Co.* 5 Cush. 602, 605.

Pub. Sts. c. 156, § 35, provided that in contested cases in the Probate Court or in the Supreme Court of Probate, costs in the discretion of the court could be "awarded to either party to be paid by the other, or to either or both parties to be paid out of

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the estate, . . . as justice and equity may require." In *Brown* v. *Corey*, 134 Mass. 249, decided in 1883, it was adjudged that the court had no power to allow counsel fees or other expenses as costs in addition to the taxable costs. The very next year, probably as the result of this decision, the statute was amended by adding after "costs" the word "expenses." St. 1884, c. 131. In *Willard* v. *Lavender*, 147 Mass. 15, 16, it was said by Morton, C. J., that "the purpose of the amendment was to give the courts of probate power, in contested cases, to award to either party costs as between solicitor and client, and the expenses of the suit to be paid by the adverse party, or out of the estate, in the discretion of the court, in analogy to proceedings in equity on bills for instructions by executors or trustees." Under this statute which ever since has been in force it has been the practice, where justice and equity required, to allow as a part of the expenses a moderate sum for counsel fees, based upon the rule stated in *Willard* v. *Lavender*.

R. L. c. 165, § 44, provides that "the expenses and costs of the inquiry and proceedings . . . for the removal of an attorney shall be paid as in criminal prosecutions." In *Burrage* v. *County of Bristol*, *ubi supra*, it was held that the word "expenses" in this statute includes "counsel fees." In giving the opinion Rugg, C. J., after stating that such a proceeding was a matter of vital interest, proceeds to state the main ground upon which the decision rested in the following language: "These words ['expenses,' 'costs,' etc.], have been in our statutes dealing with this matter since 1836. It is agreed that the practice has been for many years for the counties to pay for professional services rendered in prosecuting disbarment proceedings. Where the language of a statute is of doubtful import, the contemporaneous construction put upon it by officers thereby charged with performance of public duties is strong evidence of its meaning. The understanding and application of statutory words susceptible of different meanings, through years of practice, and sanctioned by the acquiescence of the Legislature, is significant of the intention with which they were employed originally." Briefly stated, the ground of the decision was that the acquiescence of the Legislature for two generations in the interpretation given in practice to its own language susceptible of two meanings, is ground for hold-

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ing that this interpretation is in accordance with the legislative intent.

In *Whitney* v. *Lynn*, 122 Mass. 338, which was a petition for a jury "to assess the indemnity for trouble and expense" occasioned to the petitioner by the laying out of a street over his land not finally entered upon for the construction of the street, it was held that under Gen. Sts. c. 43, § 14, which provided that if in such a case a person "has been put to trouble and expense by the proceedings" to lay out, "the commissioners shall allow him full indemnity therefor," the petitioner was entitled to recover money paid to counsel solely concerning these proceedings for the two years after the lay out. There was no claim for allowance for counsel fees for services in the suit itself.

So in *Boston & Albany Railroad* v. *Charlton*, 161 Mass. 32, which was a proceeding for the abolition of grade crossings under St. 1890, c. 428, it was held that money paid by the town for reasonable counsel fees in defending claims for damages for land taken were to be allowed under § 7 as a part of the accounts of expenses. The court say (p. 34): "The general purpose of the sections of the statute . . . is, that the whole cost or expense of the entire work . . . should be paid by the railroad company, the Commonwealth, and the city or town. Legal expenses may be unavoidable, and if reasonably incurred we think that they must be held to have been incurred for the benefit of all in the proportions in which the general cost or expenses are to be borne, and that they should be allowed."

And when actions are brought to recover indemnity either where the right to indemnity is implied by law or arises under a contract, reasonable counsel fees which have been incurred in resisting the claim indemnified against may be recovered as a part of the damages and expenses. *Hadsell* v. *Hancock*, 3 Gray, 526. *Pond* v. *Harris*, 113 Mass. 114. *Faneuil Hall Ins. Co.* v. *Liverpool & London & Globe Ins. Co.* 153 Mass. 63. *Montgomery Door & Sash Co.* v. *Atlantic Lumber Co.* 206 Mass. 144, 157, and cases cited. See also *Bangs* v. *Fallon*, 179 Mass. 77, as to the right to a reasonable sum paid for counsel fees in foreclosing a mortgage under a power of sale. So where the plaintiff, in consequence of the wrongful conduct of the defendant, has been put to expense in the employment of counsel, the amount so paid is an element of

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damage in an action against the defendant arising out of such wrongful conduct. *Wheeler* v. *Hanson*, 161 Mass. 370, and cases cited.

Courts of equity, in certain cases under its general powers, allow counsel fees. *Frost* v. *Belmont*, 6 Allen, 152. *Brown* v. *Corey*, 134 Mass. 249, 251.

The above are the leading cases where this court has had occasion to consider the meaning of the term "expenses." It is unnecessary to cite other cases. It is plain that as applied to expenses incurred in the suit itself the word is capable of two meanings, and its true meaning is to be determined by a consideration of the circumstances.

It is to be noted that we are not dealing with a case in equity like *Frost* v. *Belmont*, *ubi supra*, nor with the practice in probate courts existing under St. 1884, c. 131, a statute manifestly passed to remove the disability of the probate courts before that time to allow counsel fees, nor with liabilities to indemnify, whether created by law or express contract, as in the cases hereinbefore cited on that branch of the subject, nor with a prosecution of an inquiry conducted by the court or under its authority into the alleged misconduct of an attorney at law, as in *Burrage* v. *County of Bristol*, 210 Mass. 299, — a proceeding *sui generis*, and where a long continued practice seemingly sanctioned by the Legislature aids in the solution, nor where, as in *Boston & Albany Railroad* v. *Charlton*, 161 Mass. 32, the expenditures are for a work for which all the parties are answerable. Nor yet where, as in *Wheeler* v. *Hanson*, 161 Mass. 370, the plaintiff has in a previous action been put to the expense of employing counsel by reason of the unlawful conduct of the defendant. On the contrary we are dealing with a proceeding in the nature of an action at law. There are only two parties, the taxpayer and the town. There is only one question, whether there shall be an abatement. The interests of the parties are directly antagonistic to each other, — the one being for abatement, the other against it. Neither is under any obligation to indemnify the other. They stand "at arm's length" with reference to each other. The question arises upon a demand against the taxpayer. He has a right to have the matter heard and decided according to law. In all material respects the proceeding is an action at law. It is true that it is for the interest of all that taxes

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should be finally fixed with promptness and should be speedily collected. But the proceeding for an abatement in no way interferes with the collection of a tax as originally assessed. The tax as originally assessed may be collected, notwithstanding these proceedings. In the present case it was paid pending the proceedings. The application for abatement may be made even after the tax is paid.

We are not dealing with the question of expenses incurred in some other suit, but with those incurred in the proceeding in which the claim is made as a penalty for failure therein.

As has been said, there are two separate tribunals to either of which at his option the taxpayer may go on appeal from the assessors, the county commissioners or the Superior Court. In one, in case of defeat he is not liable to the town either for its costs or expenses; in the other, he is liable for both. The liability of the defeated party in an action at law to pay the counsel fees of the prevailing party is certainly unusual. We know of no case except in our statutes as to trustee process. There the right of the trustee under certain circumstances to have his reasonable counsel fees paid is given, but given in clear and explicit terms. And if in the statute under consideration it had been the intention of the Legislature to impose upon the taxpayer the obligation in case of defeat to pay the counsel fees of the opposite party, it easily could have expressed that intent in clear and unmistakable language.

In view of the nature of the action, the direct antagonism of the parties, the usual course of proceedings in actions at law with reference to counsel fees incurred by either party, the ambiguity of the word "expenses," and the various decisions of this court when the word has come up for interpretation, with the other considerations hereinbefore mentioned, we are constrained to say with reference to the statute under consideration, what in *Marshall Fishing Co.* v. *Hadley Falls Co.* 5 Cush. 602, 605, this court said in reference to the statute then before it: "We cannot suppose that the Legislature intended to embrace counsel fees in the above provision."

The exceptions are overruled; and, in accordance with the agreement of the parties in such case, judgment is to be entered for the respondent in the sum of $227.63 in addition to ordinary tax-

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able costs in the original case, but not including any further sum for the cost of printing the brief in said case. And it is

So ordered.

ROLLIN E. HARMON, Judge of Probate, *vs.* HENRY E. WESTON & another.

AMERICAN SURETY COMPANY OF NEW YORK *vs.* ROLLIN E. HARMON, Judge of Probate, & others.

Essex. March 19, 20, 1913. — June 17, 1913.

Present: RUGG, C. J., MORTON, LORING, SHELDON, & DE COURCY, JJ.

Bond, Of trustee. *Trust*, Action on bond of trustee. *Surety. Subrogation. Equity Jurisdiction*, Avoiding circuity of action, Subrogation. *Power. Interest.*

Under Pub. Sts. c. 143, §§ 18, 20, cl. 3 (now R. L. c. 149, §§ 29, 31), where a judgment is obtained in an action against the surety on the probate bond of a trustee, execution must issue, without expressing that it is for the use of any person, for the full amount of all the estate of the testator which came to the hands of the trustee for which he did not satisfactorily account either in the Probate Court or by payments made directly to or for the benefit of the parties entitled thereto.

The surety on a probate bond is liable jointly with his principal; and, if in an action on the bond no service has been made on the principal and he has not appeared, this does not affect the liability of the surety, who is liable for the default of the principal to the full extent of that default not exceeding the amount of the judgment for the penal sum of the bond.

In action on a probate bond, given by one of two trustees, in which judgment had been obtained against the defendant surety, it appeared that the two persons who were the trustees were entitled to the whole income of the trust during their lives, that the defendant trustee misappropriated a part of the principal of the fund and that this misappropriation was at least in part made possible by the negligence of his cotrustee, that at the time the bond and a similar bond of the cotrustee were given the trustees also executed an agreement with the surety by which they jointly covenanted to indemnify the surety for all liabilities incurred upon the bonds and that the surety at its option should be subrogated to all the rights of the principals. When the action was brought the defendant trustee had disappeared and his cotrustee had died. *Held*, that the surety was subrogated to the rights of the two principals to receive the income from the entire trust fund for the period between the time of the misappropriation and the time of the death of the cotrustee, and that, therefore, to avoid circuity of action, the income of the part of the trust fund that had been misappropriated would be regarded as fully accounted for by the

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trustees, and was not to be included in the amount for which execution was to issue.

In an action on a probate bond given by one of two trustees, in which judgment had been obtained against the defendant surety, it appeared that the two persons who were the trustees were to receive in equal shares the income of the trust fund during their lives, and that on the death of either of them the half of the fund of which he received the income was to be paid to his issue, if any, and in default of issue, to whomsoever he might by will appoint, or in default of appointment to the heirs of the testator, that the defendant trustee misappropriated a part of the principal of the fund and that this misappropriation was made possible by the negligence of the other trustee, that the defendant trustee was living, and that his cotrustee had died, leaving no issue, and by will had appointed one half of the trust fund to a certain person, who was one of his creditors. It was contended by the defendant surety that it was subrogated to the rights of the deceased trustee and that such subrogation included the property received by the appointee under the exercise of the power of appointment by such deceased trustee. *Held*, that the deceased trustee, who was the donee of the power, had himself no interest in any part of the principal of the fund, the property having come to the appointee from the donor through the exercise of the power, so that subrogation to the rights of the deceased trustee could not include any part of the principal of the fund, and that it was not necessary to consider what questions would have arisen if the deceased trustee had failed to exercise the power of appointment.

Where, in an action on a probate bond, judgment is entered for the penal sum of the bond with interest thereon, if the amount for which execution properly should issue exceeds such penal sum, the allowance of interest is correct as compensation for the wrongful detention of the money; and, even if the amount for which execution is to issue does not exceed such penal sum, it cannot be said that the defendant is harmed by the allowance of interest in the entry of judgment, for he can be held only for the amount for which execution is to issue.

A suit in equity by the surety on a probate bond, given by a trustee who was entitled to share as beneficiary in the income of the trust fund and who misappropriated a part of such trust fund, for the appointment of a receiver to hold the interest of such defaulting trustee, to which the plaintiff claims to be subrogated so far as the amount of such interest has been made good by the plaintiff as the surety on his bond, with directions to account to the plaintiff for the income during the lifetime of such defaulting trustee and on his death to pay to the plaintiff any part of the principal of the trust fund to which such defaulting trustee may be entitled, cannot be maintained, where such defaulting trustee has no interest in the principal of such trust fund but only a contingent power of testamentary appointment over a share of the fund in case he dies without issue and it cannot be determined until after his death who will become entitled to the share.

SHELDON, J. The first of these cases is an action upon the bond given to the Judge of Probate by the first named defendant as one of the trustees under the will of Nathaniel Weston, with the other defendant the American Surety Company (hereinafter called the company) as surety. There was a breach of the bond,

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and judgment has been entered against the defendants for the penal sum of the bond, with interest from the date of the writ. The case was referred to an assessor to determine the amount for which execution should issue; his report has been made, and the facts therein stated have been found to be true; and the case comes to us upon a report from the judge of the Superior Court.*

Henry E. Weston and his brother William H. Weston were duly appointed and became trustees of the fund in question, then amounting to about $150,000. By the will of Nathaniel Weston, the testator who created the trust, the income of the fund was to be paid to his nephews Edward S. Weston, Henry E. Weston, William H. Weston and Lawrence W. Jenkins, during their lives. On the death of each nephew the share of the principal of which he received the income was to be paid "to his issue if any, and in default of issue, to whomsoever he may by will devise and bequeath the same, or order it to be paid over to. And in default of issue and a testamentary disposal of the same, to my [the testator's] heirs at law." By a codicil to his will, the testator provided as follows: "I revoke so much of my will as relates to my nephew Lawrence W. Jenkins and make no provision for him."

Edward S. Weston died in 1882; the share of the trust fund of which he had the income has been properly disposed of; and no question arises in reference thereto.

Henry E. Weston had a power of attorney from his brother William, and had the active management of the trust, though William signed some papers with him, and was aware of some parts of his conduct. He never filed any account in the Probate Court. He misappropriated much of the income and about $123,000 of the principal of the trust fund. In 1902 he was removed by the Probate Court from his position as trustee. His cotrustee, William H. Weston, died on May 21, 1905, leaving no

* *Hitchcock* J. The writ was dated February 18, 1904. The assessor was James D. Colt, Esquire. Henry E. Weston was removed as trustee on December 22, 1902. This action on his bond was brought in the name of the judge of probate for the benefit of W. C. Cogswell and William H. Weston, trustees, and for William H. Weston personally. William H. Weston died on May 21, 1905, leaving no issue, and leaving a will by which he exercised a power of appointment, as described in the opinion, in favor of one Pratt, a creditor.

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issue. Walter C. Cogswell has been appointed trustee of the fund by the Probate Court, and now holds that office.

The two trustees, Henry and William, on their appointment in 1896 gave separate bonds, each in the sum of $150,000, to the Judge of Probate, but each with the same surety, the company. They gave at the same time their joint written agreement, under seal, to the company, whereby, in consideration of the company's having become surety upon the two bonds mentioned, they agreed, among other things, that they would at all times indemnify and save the company harmless from all damages, liabilities and expenses whatever; that the company should at its option have and be entitled to exercise in their names or otherwise all their rights, remedies and privileges in the premises; that nothing in the agreement nor any act of theirs in the premises should operate to abridge, defer or limit the right of the company to become subrogated to all rights or remedies, or to limit or abridge or in any way interfere with any rights, remedies or privileges, whether by subrogation or otherwise, of the company; and that the right of the company to subrogation was affirmed and extended to all their rights and privileges in the premises.

The plaintiff now contends that execution should issue for the full amount of the deficiencies in the principal of the fund, with interest on the different items thereof from the respective dates of their conversion, and for the income not paid to William or to William's assignee with interest thereon, up to the limit of the amount of the judgment with interest thereon. Only the company defends the suit; and its contentions will be dealt with hereafter.

By the terms of the statute in force both when this bond was given and now, the proceedings herein are to be "conducted in like manner as is provided [by statute] relative to actions on bonds given by executors and administrators." Pub. Sts. c. 143, § 18. R. L. c. 149, § 29. Those provisions applicable to this case are found in the third clause of Pub. Sts. c. 143, § 20, and R. L. c. 149, § 31, that "if the action is brought for a breach of the condition in not accounting for the estate as required by law, execution shall be awarded, without expressing that it is for the use of any person, for the full value of all the estate of the deceased that has come to the hands of the executor or administrator, and for

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which he does not satisfactorily account." In our opinion, that is the rule to be followed in this action. *Conant* v. *Kendall*, 21 Pick. 36. *Newcomb* v. *Williams*, 9 Met. 525. *Winslow* v. *Otis*, 5 Gray, 360, 363. *Choate* v. *Arrington*, 116 Mass. 552. The remedy given by R. L. c. 162, § 38, as amended by St. 1907, c. 129, is cumulative; it gives an additional protection to that afforded by a suit on the bond.

So too we are of opinion that the obligation of a surety upon a probate bond is the same as that of the principal. The principal and the surety are jointly liable, not severally, or jointly and severally, as was the case with the bond sued on in *Briggs* v. *McDonald*, 166 Mass. 37, 40. If the surety has not been wholly discharged (*Thayer* v. *Finnegan*, 134 Mass. 62), only one judgment can be rendered against both; and that judgment is for the default of the principal, and for the amount for which he is liable. As was said by Loring, J., in *Bassett* v. *Fidelity & Deposit Co.* 184 Mass. 210, 214: "This is more than a technical rule of law, it is an instance where the true character of a surety's liability comes to the surface." The rule often has been declared by this court. See for example *Chapin* v. *Waters*, 110 Mass. 195, 197; *Choate* v. *Arrington*, 116 Mass. 552; *McKim* v. *Hibbard*, 142 Mass. 422, 428. So it was said by Wells, J., in *Choate* v. *Arrington*, *ubi supra* (p. 556): "The surety is liable for whatever is fairly chargeable to his principal in the official capacity on account of which the bond was given." Of course it can make no difference that in this case the principal, though named as a defendant, has not been found, has not been served on, and has not appeared. The surety is still liable for the default of the principal, and to the full extent of that default, not exceeding the amount of the judgment.

But it is upon a hearing in equity that the amount for which execution is to issue, that is, in this case, the amount of the assets which are not satisfactorily accounted for, is to be determined; and it is only to enforce payment of the amount equitably due that process is to issue. Pub. Sts. c. 143, § 20. R. L. c. 149, § 31; c. 177, § 10. *Shurtleff* v. *Ferry*, 138 Mass. 259. The amount to be paid is not necessarily the whole amount for which account has not been rendered in the Probate Court, but that which has not been accounted for either to the Probate Court, or by payments made directly to or for the benefit of the parties entitled thereto,

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though made without the authority of the court, or otherwise. This was the doctrine of *Browne* v. *Doolittle*, 151 Mass. 595, although that was a proceeding against the administrator and not an action upon his official bond. So in *Forbes* v. *Allen*, 166 Mass. 569, payments made by an executor to the beneficiary of a trust created by the will but not actually established by the executor, although they were made without authority from the court, without special application to any particular claim or demand, and in excess of the amount of a legacy given directly to that beneficiary, were yet credited to the defendants (principal and surety alike, as we have seen must be the case) in an action upon the executor's bond.

Applying the principle stated to the facts before us, it appears that until the death of William H. Weston in May, 1905, the income of the fund was payable to Henry E. Weston and William H. Weston, one half to each. But upon the company's paying the amount of this defalcation in both principal and income, it would by operation of law be subrogated to the rights of these beneficiaries for life from the date of the bond by which its liability was created. *Stetson* v. *Moulton*, 140 Mass. 597. *Blake* v. *Traders' National Bank*, 145 Mass. 13. And by the joint agreement of these trustees with the company, made when the bonds were executed, they expressly created a conventional subrogation against both of them. Accordingly, if this income or any part of it should be included in the amount now to be paid by the company, as soon as it was received by the new trustee it would be his duty to pay this income over to the company as the equitable assignee of both the Westons, and this would of itself create a satisfactory accounting for that income; that is, the case would stand as if the income up to May, 1905, had been properly accounted for by the principal in the bond; and that result would have been brought about by the forced payment of that income upon the execution now to be issued, and its immediate repayment to the company. This is a needless circuity, such as the law does not favor and ought not to allow. *Railroad Co.* v. *Smith*, 21 Wall. 255. *North Chicago Rolling Mill Co.* v. *St. Louis Ore & Steel Co.* 152 U. S. 596. It is true of course that the right to subrogation strictly so called does not arise in favor of a surety until he has paid the debt for which he is bound, and there is no occasion to cite authority for the rule;

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but it is also true that to avoid circuity of action equity will protect those who by an enforced payment will become at once entitled by subrogation to indemnity from the one who is to receive that payment. *Belknap* v. *Belknap*, 5 Allen, 468. *Ferrer* v. *Barrett*, 4 Jones, Eq. 455. *State* v. *Atkins*, 53 Ark. 303. And for the reasons that have been stated this defense *pro tanto* is equally available to the principal and the surety.

It follows that neither the income misappropriated nor interest on the principal sums so misappropriated, up to the date of the death of William H. Weston, or the date of the judgment if as appears that preceded his death by some days, should be included in the amount for which execution is to issue.

William H. Weston had a power of appointment by will over one half part of the fund. He exercised this power in favor of one Pratt, a creditor of his. We need not determine the validity of this appointment as against William's other creditors. Disregarding for the moment the claim set up by the company, it is manifest that if the appointment comes under the general rule that its effect was to subject the appointed property to the claims of his creditors, then the fund must be paid to the administrator of his estate for distribution among them, for his estate was insolvent. *Olney* v. *Balch*, 154 Mass. 318, 322, explaining *O'Donnell* v. *Barbey*, 129 Mass. 453. *Clapp* v. *Ingraham*, 126 Mass. 200. *Tuell* v. *Hurley*, 206 Mass. 65. See *Fleming* v. *Buchanan*, 3 DeG., M. & G. 976, and *In re Hadley*, [1909] 1 Ch. 20, 35. If it could be successfully contended that Pratt was not a volunteer and was entitled to take the appointed property in spite of any claims of creditors (as to which see *Beyfus* v. *Lawley*, [1903] A. C. 411; *In re Lawley*, [1902] 2 Ch. 673, and [1902] 2 Ch. 799; and *Patterson* v. *Lawrence*, 83 Ga. 703), then Pratt would be entitled to receive it. But the company contends that Pratt as William's appointee claims merely under the latter, and that as William's negligence was at least partially responsible for Henry's defaults, and as it is entitled against William both to the equitable subrogation of a surety and also to a full conventional subrogation under the joint agreement of Henry and William which has been stated, so it now is entitled to the full benefit of William's own interest and also of that of all who claim under him, including the principal of the one half part of the fund of which William made an appointment. But we can-

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not adopt this contention. William had himself no interest in any part of the principal of the fund. *Crawford* v. *Langmaid*, 171 Mass. 309. *Sise* v. *Willard*, 164 Mass. 48. It is from the donor of the power that the property comes to him who takes it, either through the exercise of that power by its donee or by reason of the latter's failure to exercise it. *Emmons* v. *Shaw*, 171 Mass. 410, 412, and cases there collected. "The donee of the power is not the owner of the estate." Hammond, J., in *Hooper* v. *Hooper*, 203 Mass. 50, 58. William's power could be exercised only by will; he could not himself by any other act or deed give any interest in the property after his death, nor could the law by reason of any agreement or conduct of his create such an interest against those entitled to the property either by his appointment or by reason of his failure to make any. It is true that, if he had failed to make any appointment, it might have been contended that under the provisions of Nathaniel Weston's will the title to one half of the fund vested upon William's death in Henry and William as heirs of Nathaniel, and so could be taken by the company under its right of subrogation and their agreement; but that is not the case, as an appointment was made, and we need not consider what then would have been the rights either of the company or of the general creditors of William.

It follows that the company is to be charged with one half of the principal sum found by the assessor.

For the reasons already stated, the interest on the other half of this sum is not to be included in the amount for which execution is to issue. That income did belong to Henry; the right to it now is vested in the company; and it is satisfactorily accounted for by giving the benefit of it to the company. As to the principal of this half part, it is not yet ascertained who will be entitled to receive it upon the death of Henry. If he should marry and have issue, they doubtless would claim to be so entitled. If he should have no issue, but should make an appointment of the fund by will, the same questions would arise which have been stated in regard to the appointment made by William in his will. If he should die without issue and having made no appointment, it may be that his estate or the estate of William would become entitled to the fund, and there might be a question between the creditors and the company as to their respective rights. But we do not know what

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the facts will be, and it would be useless to attempt to state the rules of law which will be applicable thereto. The remaining half of the sum found by the assessor must be included in the amount for which execution is to issue, but without interest. This whole amount will come into the hands of the new trustee, and will be administered by him under the direction of the Probate Court; and the rights of all parties, under whatever circumstances may arise, will then be passed upon and determined, and the accounts of the new trusteee will be stated in that court. *Cathaway* v. *Bowles*, 136 Mass. 54. *Cummings* v. *Cummings*, 143 Mass. 340. *Murray* v. *Wood*, 144 Mass, 195. *Ricketson* v. *Merrill*, 148 Mass. 76. *Thorndike* v. *Hinckley*, 155 Mass. 263. *Upham* v. *Draper*, 157 Mass. 292. *Green* v. *Gaskill*, 175 Mass. 265. *Fletcher* v. *Fletcher*, 191 Mass. 211, 217. *Rhines* v. *Wentworth*, 209 Mass. 585. *Norton* v. *Lilley*, 210 Mass. 214, 217.

Judgment was entered for the penal sum of the bond, with interest thereon. If the amount for which execution is to issue exceeds that penal sum, this was correct. *Harris* v. *Clap*, 1 Mass. 308. *Warner* v. *Thurlo*, 15 Mass. 154. *Bank of Brighton* v. *Smith*, 12 Allen, 243. *White* v. *French*, 15 Gray, 339. *Bassett* v. *Fidelity & Deposit Co.* 184 Mass. 210. *George H. Sampson Co.* v. *Commonwealth*, 202 Mass. 326, 339. *Rogers* v. *Abbott*, 206 Mass. 270, 275. *Rowe* v. *Peabody*, 207 Mass. 226, 237, 238. If this was not so, we cannot say that it was wrong. Certainly the defendant was not aggrieved, for it can be held only for the amount for which execution is to issue. The defendant has not argued this point; but we cannot pass it over, for it was expressly reserved by the report for our consideration.

It follows that the judgment must be affirmed, and that execution must issue for the sum of $123,825.99.

So ordered.

The second case is a bill in equity,* in which the company, the second named defendant in the first case, seeks to enjoin the prosecution of that action further than to ascertain the amount of the deficit for which the Westons are responsible, to enjoin the issue

* Filed in the Supreme Judicial Court on January 20, 1906, and amended on November 7, 1906, November 3, 1911, and October 25, 1912.

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of any execution therein, and to have a receiver appointed to hold the interest of Henry E. Weston in the trust estate so far as made good by the company, and account to the company for the income thereof during the life of Henry, and if he should die without issue, to pay the principal to the company. For the reasons already stated, there are no grounds upon which these prayers for equitable relief can be granted. The bill is not supported by the decision in *Belknap* v. *Belknap*, 5 Allen, 468. That did not at all concern the liability or the rights of a surety on a probate bond. It was a dispute between a *cestui que trust* on one side and on the other side the other *cestui que trust*, who was also the defaulting trustee, and an assignee of his interest in the trust estate. As applied to the facts of this case, that decision goes merely to uphold the contention that if Henry E. Weston had continued to hold the office of trustee, neither he nor an assignee of his interest would have been allowed, against the objection of the other *cestui que trust*, to take any benefit of the trust by receiving either commissions or any part of either the income or principal of the trust fund until he had made good his default, and that neither he nor his assignee could be heard to say that the surety on his bond must make compensation therefor and so that he might himself take whatever was to come to him and leave his default to be made good by his surety.

In *Stetson* v. *Moulton*, 140 Mass. 597, the bill was brought after the facts had been settled and the equitable rights of the plaintiff had become vested, and the decision merely upholds the right of the surety to be subrogated to the rights and remedies which those whom he has been compelled to pay held against his principal. Both that case and the decision in *Commonwealth* v. *Gould*, 118 Mass. 300, 307, go to show that the present bill cannot be maintained. Nor can this plaintiff find any comfort in such cases as *Ingersoll* v. *Coram*, 211 U. S. 335, or *Coram* v. *Davis*, 209 Mass. 229, in which equitable claims against the shares (determined or to be determined in the Probate Court) of distributees in an estate in the course of administration were litigated. Here it has not been determined, it is not for us now to determine, and as to the share of which Henry E. Weston was to take the income it cannot now be determined by any court, who are the parties that will become entitled.

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The only question is whether, under the prayer for further relief, the bill should be retained, as was done in *Lenz* v. *Prescott*, 144 Mass. 505, to secure to the plaintiff such rights as may come to it upon facts that may arise in the future. But the administration of the fund must be had in the Probate Court, and it is uncertain what facts will be hereafter developed. For example, it is not for us now to determine the liability to a succession tax of the property that has been appointed by William, or of that which will or will not be appointed by Henry. Sts. 1909, c. 527, § 8, and 1912, c. 678, § 3. *Emmons* v. *Shaw*, 171 Mass. 410. *Minot* v. *Treasurer & Receiver General*, 207 Mass. 588. *Attorney General* v. *Stone*, 209 Mass. 186. *Burnham* v. *Treasurer & Receiver General*, 212 Mass. 165. Nor can we now declare the right of the parties to the fund, as was done in *Holmes* v. *Holmes*, 194 Mass. 552. No present ground is shown for equitable relief; and the decree of the single justice* sustaining the demurrers of the several defendants and dismissing the bill with costs must be affirmed.

So ordered.

H. Wheeler, (*H. Le B. Sampson* with him,) for the American Surety Company of New York in both cases.

W. C. Cogswell, for Cogswell and Jenkins.

A. C. Vinton, for Vinton, administrator.

J. H. Stone, for M. L. Pratt, submitted a brief.

NEW ENGLAND NEWS COMPANY *vs.* METROPOLITAN STEAMSHIP COMPANY.

Suffolk. March 25, 1913. — June 17, 1913.

Present: RUGG, C. J., MORTON, LORING, SHELDON, & DE COURCY, JJ.

Carrier, Of Goods. *Bill of Lading*. *Damages*, In contract.

In an action against a carrier for the loss of certain bags of periodicals in the hands of the defendant, the defendant's liability was admitted and the only question was in regard to the measure of damages. There was a stipulation in the bill

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* *De Courcy*, J.

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of lading that any loss or damage for which the carrier was liable should "be computed on the basis of the value of the property (being the *bona fide* invoice price, if any, to the consignee . . .)." It appeared that the plaintiff purchased periodicals from a news company, which was one of the two consignees, and paid for them weekly, with the privilege of returning those unsold to the news company or by its direction to the publisher, who was the other consignee, that thereupon the plaintiff was given credit for the prices originally paid by him for the periodicals returned, no credit being given for those not actually received, and that the periodicals in question were being returned under this agreement, the charge paid to the defendant as carrier being that fixed for the original carriage of new magazines and not the much lower charge made for waste or paper stock. It further appeared that when the plaintiff delivered the goods to the defendant he sent to each consignee an invoice containing a list of the periodicals sent and of the prices charged in accordance with the agreement with the news company. *Held*, that in effect the periodicals lost in the hands of the defendant were being resold by the plaintiff to the news company at an agreed price, that there was ample evidence that the invoice price was a *bona fide* one, and that the defendant was bound by its agreement contained in the bill of lading to pay damages computed on the basis of that price.

In the above described action, it appeared also, that when unsold periodicals were returned by the plaintiff to the news company, that company was accustomed to make the plaintiff an allowance for its expenses in handling the goods returned and that this allowance was fixed at a certain rate per pound. It did not appear that the defendant had had any knowledge or notice of this agreement or method of doing business. *Held*, that the allowance for handling the returned goods was not included in the "invoice price" for which the defendant agreed to be liable, and that the plaintiff could not recover it as a part of his damages.

DE COURCY, J. The plaintiff seeks to recover the value of twenty-eight bags of magazines or periodicals, of recent but not current issues, shipped by steamer from Boston to New York on July 14, 1910, and destroyed by fire at the defendant's dock in New York city on July 16, 1910. The case is here by report* on the pleadings and an agreed statement of facts; and the only question involved is the measure of damages.

The contract between the parties, so far as material to the question in controversy, is set out in section 3, on the back of the bill of lading, in these terms: "The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the *bona fide* invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment." If then there was a *bona fide* invoice price fixed between the plaintiff and the consignees of these

* By *Hardy*, J., who found for the plaintiff in the sum of $775.36 with interest from July 16, 1910.

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goods, that invoice price and not the market value of the magazines as waste paper, is the measure of damages in this action.

It appears from the agreed facts that at the time the plaintiff delivered the merchandise to the defendant it sent to each consignee an invoice containing a detailed list of the magazines sent, and of the prices charged to them for each item. The plaintiff purchased periodicals from the American News Company, one of the consignees; and by an agreement long existing between them the plaintiff paid therefor weekly, subject to a return privilege. Magazines not sold by the plaintiff were returned to the American News Company, or by its direction to the publisher, Tousey, the other consignee, and credit was given on its account with the American News Company for the price the plaintiff originally paid for the periodicals. If for any reason the magazines were not actually received by the American Company, as was the case here, no credit therefor was given to the plaintiff. In effect, the magazines involved in this action were being resold by the plaintiff to the American News Company, according to the agreed price; and the charge paid to the defendant for the shipment was that fixed for the original carriage of new magazines and not the much lower commodity rate for waste or paper stock. There is ample evidence that the invoice price was a *bona fide* one, and the defendant is bound by the agreement into which it voluntarily entered. *Graves* v. *Lake Shore & Michigan Southern Railroad,* 137 Mass. 33. *Peirce* v. *American Express Co.* 210 Mass. 383. *Coleman* v. *New York, New Haven, & Hartford Railroad, ante,* 45.

The defendant admits that it is liable for the value of the bags, which is $18.20.

The American News Company was accustomed to allow the plaintiff for its expense in handling the magazines that it did not sell, such allowance being a fixed rate of one cent a pound on goods returned to Tousey and two cents a pound on goods returned to the American Company. The allowance for handling the goods in question would amount to $74.51; and the plaintiff seeks to recover that sum in this action. We are of opinion that the defendant is not liable for this item. It is not included in the "invoice price" for which the defendant agreed to be liable; and so far as appears the steamship company had no knowledge or notice of this agreement or method of business between the

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plaintiff and the American News Company when accepting these shipments.

In accordance with the report, judgment is to be entered for the plaintiff in the sum of $700.85, with interest thereon from July 16, 1910, and taxable costs.

So ordered.

The case was submitted on briefs.

F. J. Horgan & C. F. Hilly, for the plaintiff.

C. C. Barton & C. C. Barton, Jr., for the defendant.

HOLYHOOD CEMETERY ASSOCIATION *vs.* INHABITANTS OF BROOKLINE.

Norfolk. March 27, 1913. — June 17, 1913.

Present: RUGG, C. J., MORTON, LORING, SHELDON, & DE COURCY, JJ.

Damages, For property taken or injured under statutory authority. *Cemetery. Practice, Civil*, Argument before full court.

At the trial of a petition by a cemetery corporation against a town for the assessment of damages for the taking of an easement in a strip of land of the petitioner for the purpose of constructing and maintaining a sewer therein, it is proper for the presiding judge to instruct the jury, that in determining the value of the property taken they may consider all the uses to which it properly might have been applied if it had not been taken, and that they may take into consideration the adaptability of the land for cemetery purposes.

At the argument before this court of the question of law, whether the instructions of a trial judge to a jury, upon the assessment of damages for the taking of an easement in a strip of land of a petitioner for the purpose of constructing and maintaining a sewer, were correct, it is not open to the respondent to argue that the amount of damages found by the jury was excessive, that having no bearing upon the question before this court, although it might properly have been addressed to the trial judge in support of a motion for a new trial.

PETITION, filed in the Superior Court on November 4, 1909, by a cemetery corporation for the assessment by a jury of damages for the taking by the town of Brookline of an easement in a strip of land twenty-five feet wide, extending across the petitioner's cemetery and containing twenty-two thousand three hundred

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square feet, for the purpose of constructing and maintaining a sewer in the land.

The case was tried before *Brown*, J. The judge gave the instructions and made the ruling which are quoted in the opinion. He then submitted to the jury the following questions, to which the jury gave the answers which are printed after the respective questions:

1. "What was the market value of the easement for the sewer taken in the strip of land in question, having reference to all purposes or uses to which the land was adapted including its adaptability for cemetery purposes?" The jury answered, "$3,857.35."

2. "What was its market value disregarding the adaptability of the land for cemetery purposes?" The jury answered, "$529.37."

3. "What damage, if any, was done to the remaining land of the petitioner?" The jury answered, "None."

The judge reported the case for determination by this court. If the instructions and ruling were correct, judgment was to be entered for the petitioner for $3,857.35; if they were not correct, judgment was to be entered for $529.37.

M. J. Sughrue & James J. McCarthy, for the petitioner, were not called upon.

F. H. Williams, for the respondent.

De Courcy, J. This is a petition to recover damages for the taking of an easement in a strip of land for the purpose of constructing and maintaining a sewer therein. The only question raised by the report relates to a ruling and certain instructions on the subject of damages given by the trial judge.

The judge instructed the jury among other things as follows: "The sum to be awarded where real estate is taken is the fair market value of the property having reference to all the uses for which it is adapted. Its value for any special purpose is not the test although it may be considered with a view of ascertaining what the property is worth in the market for any use for which it will bring the most.

"In determining damages in a case of this kind, the jury should consider not only the value of the property taken but also the effect of the taking upon that which is left; and in estimating the value of that which is taken, they may consider all the uses to which it might properly have been applied if it had not been taken.

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Damages are not to be awarded with reference to the peculiar situation or circumstances or plans of the owner or to the business in which he happens to be engaged, but any and all the uses to which that land considered as property, may profitably be applied, whether contemplated by the owner or not, may well be taken into account by the jury."

The judge also ruled that the jury, in determining the value of the easement, might "take into consideration the adaptability of the land for cemetery purposes."

The ruling and instructions were correct and in accordance with well established principles as set forth by this court. *Conness* v. *Commonwealth*, 184 Mass. 541, 542. *Maynard* v. *Northampton*, 157 Mass. 218, 219. *Smith* v. *Commonwealth*, 210 Mass. 259.

The respondent's argument that the amount found by the jury was excessive might properly have been addressed to the trial judge on a motion for a new trial, but is not pertinent to the question before us.

In accordance with the report, judgment is to be entered for the petitioner for $3,857.35.

So ordered.

KATHERINE McLEOD *vs.* SARAH RAWSON.

Suffolk. March 28, 1913. — June 17, 1913.

Present: RUGG, C. J., MORTON, LORING, SHELDON, & DE COURCY, JJ.

Negligence, In failing to light hallway. *Nurse.*

It seems, that, if a professional nurse comes at the call of a physician to attend a patient, in a house owned and controlled by such patient and occupied by him with his wife, the wife of the patient owes the nurse no duty to maintain a light in a hallway of the house so that the nurse can pass through it in safety, unless the wife has undertaken this duty by promising the nurse that she will maintain such a light and the nurse relies upon the assurance.

If the wife of a patient, who is being attended by a professional nurse in his own house, promises that she will leave a certain electric light turned on at night so that the nurse can pass through the upper hallway in safety, and performs this duty in so negligent a manner that she turns off the light without any warning, and the nurse, relying on the wife's assurance that the light will be

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maintained, passes along the hallway and by reason of the darkness falls down a stairway and is injured, the nurse can maintain an action against the wife for her injuries thus sustained, if she herself was in the exercise of due care; and it cannot be said as matter of law that she was careless in relying on the light in question to indicate the location of the stairway after the assurance given her by the patient's wife.

TORT for personal injuries, sustained by the plaintiff on August 4, 1908, while the plaintiff was engaged in the performance of her duties as a professional nurse in attendance upon the defendant's husband at the residence of the defendant and her husband in Arlington, and alleged to have been caused by the negligence of the defendant in failing to keep an electric light turned on in the night time so that the plaintiff could pass safely along an upper hallway, by reason of which the plaintiff in the darkness fell down a flight of stairs and suffered the injuries sued for. Writ dated February 1, 1912.

In the Superior Court the case was tried before *Wait*, J. The facts which could have been found upon the evidence are stated in the opinion. At the close of the evidence the judge at first submitted the case to the jury who returned a verdict for the plaintiff in the sum of $3,000. The judge then ruled that the action could not be maintained and ordered a verdict for the defendant. At the request of the plaintiff he reported the case for determination by this court, with a stipulation of the parties, that, if the ruling was right, judgment should be entered for the defendant; and that, if the ruling was wrong, judgment should be entered for the plaintiff in the sum of $3,000.

F. P. Garland, (*F. J. Daggett* with him,) for the plaintiff.

G. A. Ham, (*R. H. Willard* with him,) for the defendant.

DE COURCY, J. It was incumbent on the plaintiff to show that her injury was due to some undischarged duty that the defendant owed to her. The house in which the accident occurred was not owned or controlled by the defendant, but by Warren W. Rawson her husband, since deceased; and the plaintiff was called to the premises by his physician. There was no invitation, express or implied, extended to her by the defendant, and no relation existed between them that imposed upon the defendant a duty of keeping the premises reasonably safe for the plaintiff. The cases cited, such as those involving the duty of a landlord to his tenants and

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persons on his premises in the tenant's right, and those of a shopkeeper to customers who visit him on business, are not in point. *Gordon* v. *Cummings*, 152 Mass. 513. *Toland* v. *Paine Furniture Co.* 179 Mass. 501. *Wills* v. *Taylor*, 193 Mass. 113. *McGowan* v. *Monahan*, 199 Mass. 296. *Marston* v. *Reynolds*, 211 Mass. 590.

But although the defendant was under no obligation, founded merely on the relation of the parties, to maintain a light that would enable the plaintiff to move about the upper hall in safety, yet if she promised the plaintiff to do so, and was negligent in the manner of performing that undertaking, she thereby became liable to the plaintiff, if the latter while relying on the promise was injured by the defendant's misfeasance. *Gill* v. *Middleton*, 105 Mass. 477. *Riley* v. *Lissner*, 160 Mass. 330. *Buldra* v. *Henin*, 212 Mass. 275. *Wilkinson* v. *Coverdale*, 1 Esp. 75. *Hyde* v. *Moffat*, 16 Vt. 271. *Gregor* v. *Cady*, 82 Maine, 131.

The case is here on a report. On the testimony of the plaintiff, the jury could find that on the night before the accident, during a conversation with the defendant with reference to the electric light at the foot of the back stairs, the plaintiff said, among other things, "You must not put out that light; you must leave that light burning at night always, while I am taking care of Mr. Rawson. . . . I have to be up and down these stairs, and I am absolutely dependent upon that light going into the little room, or I may fall down these stairs — the two passages are so near together;" that the defendant replied: "All right then, I will leave it burning." They could find further that soon after the accident, the defendant said "You fell down those stairs, and I am so sorry I put out that light. What did I put out that light for?"

It was necessary for the plaintiff to use the hall during the night in going to and from the bath room; and opposite the door of the bath room, and only three feet from the opening of the back stairs, was the door of the anteroom, which was connected with the room of the patient. The plaintiff testified that she depended absolutely upon the reflection of the light at the foot of the back stairs to show her the entrance from the hall to the anteroom, that the rest of the hall was pitch dark, and that such was the condition as to light when the defendant conversed with her at eleven o'clock, before retiring. On these facts it was for the jury to decide whether the defendant had undertaken to keep burning the elec-

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tric light referred to, whether she was negligent in extinguishing it, and whether that was the cause of the plaintiff's injury.

The question whether the plaintiff herself was in the exercise of due care is not free from difficulty, but we are of opinion that this also was for the jury. It could be found that she was justified in entering the anteroom from the hall instead of from Mr. Rawson's room, because it was important in his critical condition not to arouse him. And we cannot say as matter of law that she was careless in relying on the light in question to indicate the location of the stairway, especially after the assurance given by the defendant, who apparently was in charge of the premises during her husband's illness. She had safely relied on this light several times during the night, the last time being less than an hour before the accident, and although its reflection was not distinct until she reached the door leading from the hall to the anteroom, she well might assume that as it was left burning by the defendant when retiring for the night, no one would be likely to extinguish it before daylight. In brief, it was for them to determine whether her conduct, as they found it to be on the evidence, measured up to the standard of reasonable prudence under the circumstances in which she was placed. *Faxon* v. *Butler*, 206 Mass. 500.

In accordance with the report judgment is to be entered for the plaintiff for $3,000.

So ordered.

MARGARET KYLE, administratrix, *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 28, 1913. — June 17, 1913.

Present: RUGG, C. J., MORTON, LORING, SHELDON, & DE COURCY, JJ.

Negligence, Of child.

If a boy, five years and eleven months old, who has been playing in a park with three or four other boys somewhat older than himself, starts with the other boys to run across a reserved space in the middle of the street in front of a street railway car which is approaching rapidly, and, following the other boys, gets only half way across the track when he is struck by the car, he is negligent as matter of law.

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MORTON, J. This is an action of tort to recover for the death of the plaintiff's child, a boy five years and eleven months old, who was run over and killed on Huntington Avenue in Boston at about 7.25 o'clock in the evening of May 4, 1906, by a car operated by the defendant. At the close of the evidence a verdict was ordered* for the defendant on the ground that the plaintiff's intestate was not in the exercise of due care. The case is here on the plaintiff's exceptions.

We do not find it necessary to consider whether there was evidence of gross negligence on the part of the motorman since we are of opinion that the ruling was right on the ground on which it was put.

The evidence showed that the plaintiff's intestate, whom we shall speak of as the plaintiff, was playing in the park† with three or four other boys somewhat older than himself, and that they all started to run across the avenue towards Ward Street. The others got over safely, but the plaintiff, who was the last, got about as far as the middle of the track, when he was struck by the car. The car was in plain sight and well lighted, and the street also was well lighted. There is nothing to show that the plaintiff looked or listened, or attempted in any way to exercise any care to avoid a collision, but started with the other boys to run across the track in front of a rapidly approaching car which was so near to him that it struck him when he had got only half way across the track. We assume what is, of course, self evident that due care on the part of a child of six does not and cannot involve the same degree of heedfulness as in the case of an adult, and that the fact that a child is following other children may under some circumstances be considered as bearing on the question of its due care, but after making all proper allowances something must remain which shows the exercise of some care, and we are unable to find that in this case. The place where the accident happened was not on a cross walk, as in *McDermott* v. *Boston Elevated Railway*, 184 Mass. 126, but was in the space reserved for the street railway, and the case resembles more we think the cases of *Young* v. *Small*, 188 Mass. 4, *Murphy* v. *Boston Elevated Railway*, 188 Mass. 8, *Morey* v. *Gloucester Street Railway*, 171 Mass. 164, *Stack-*

* By *Morton*, J. † The Fenway.

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pole v. *Boston Elevated Railway*, 193 Mass. 562, and *Russo* v. *Charles S. Brown Co.* 198 Mass. 473, than the cases of *McDermott* v. *Boston Elevated Railway*, 184 Mass. 126, and *Breen* v. *Boston Elevated Railway*, 211 Mass. 519, on which amongst others the plaintiff relies.

Judgment on the verdict for the defendant.

W. W. Clarke, (*C. J. Muldoon, Jr.*, with him,) for the plaintiff.

H. S. MacPherson, (*J. B. Mahar*, with him,) for the defendant.

JOSEPH WALUKEWICH, administrator, *vs.* BOSTON AND NORTHERN STREET RAILWAY COMPANY.

SAME *vs.* SAME.

Essex. January 7, 1913*. — June 17, 1913.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Negligence, Of child.

If a girl seven years of age, whether following playmates or not, starts to run across a street railway track in front of a plainly visible and rapidly approaching car, which is so near that she barely has got upon the track when the car strikes her, she is negligent as matter of law, there being nothing to show that she was in the exercise of any care at all.

TWO ACTIONS OF TORT, by the administrator of the estate of Jennie Walukewich, a girl seven years of age, who was injured and killed by a street railway car operated by the defendant on River Street in Haverhill on April 25, 1907, the first action for causing the death of the plaintiff's intestate and the second action for her conscious suffering. Writs dated April 17, 1908.

In the Superior Court the cases were tried together before *Raymond*, J., who on the evidence, which is described in the opinion, ordered the jury to return verdicts for the defendant. The plaintiff alleged exceptions.

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*Although these cases were submited on briefs before *Kyle* v. *Boston Elevated Railway*, *ante*, 260, was argued, they were decided after that case on the same day.

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The cases were submitted on briefs.

J. B. Ferber, C. H. Innes & W. Turtle, for the plaintiff.

J. P. Sweeney & L. S. Cox, for the defendant.

MORTON, J. We think that this case is governed by *Kyle* v. *Boston Elevated Railway, ante,* 260. The evidence leaves it uncertain whether the child ran on to the track after two of her playmates whom she was following, or whether they turned and ran back to the sidewalk, and she started to run across the track alone. Some witnesses testify one way and some the other in regard to that matter. But whichever account of what happened is taken, the result is the same in regard to the question of the child's due care. She started to run across the track in front of a rapidly approaching car only a short distance away without apparently taking any thought for her safety. The car was so near that she hardly had got upon the track when the car struck her. There was nothing to obstruct her view or to distract her attention and nothing but her age can be pleaded as an excuse for her conduct. But the fact that she was of tender age does not alone entitle the plaintiff to recover. The defendant is not an insurer. In order to entitle the plaintiff to recover, his intestate must have exercised such care as she was capable of. The difficulty with the plaintiff's case is that she does not appear to have exercised any care at all.

The result is that the exceptions must be overruled in each case.

So ordered.

CHARLES E. SIMONDS *vs.* INTERSTATE LUMBER COMPANY.

Middlesex. May 20, 1913. — June 17, 1913.

Present: RUGG, C. J., MORTON, LORING, BRALEY, & DE COURCY, JJ.

Negligence, Employer's liability.

In an action by a teamster against his employer for personal injuries caused by the tipping over upon the plaintiff of a loaded lumber wagon when it was being driven into a field to unload the lumber, there was evidence that the plaintiff was an experienced teamster, that it was the first time that he had been in charge of the wagon, and that, although the wagon was defective, so far as the plaintiff knew or could see it was all right, that the wagon was loaded a little further forward than a wagon ordinarily would be loaded, that the plaintiff was driv-

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ing a horse in the shafts while another horse in the lead was being driven by another driver, and that the plaintiff was walking at the left hand side of the wagon, which was the downhill side when the wagon tipped over. *Held*, that the plaintiff was not negligent as matter of law in being where he was at the time of the accident and that the question, whether he was in the exercise of due care, was for the jury.

In an action by an experienced teamster, against a lumber company by which he was employed, for personal injuries caused by the tipping over upon the plaintiff of a loaded lumber wagon when it was being driven into a field to unload the lumber, there was evidence that the perch of the wagon connecting the axles was shorter than that of any other wagon owned by the defendant and that this made the wagon less stable, that the front springs were old and the rear ones new and that the body of the wagon tipped forward while all the other wagons of the defendant were level, that the king bolt was worn and the holes for the king bolt in the rocker plates also were worn, that the upper rocker plate instead of being flush with the lower one, as it should have been, was half an inch back, that these defects made the king bolt loose and caused the wagon to tip or rock from side to side, which it did more than other wagons of the defendant, and that, when the wagon tipped over, the king bolt broke in the place where it was worn. It also appeared that the wagon was loaded a little farther forward than was common, and that immediately before the accident two other wagons of the defendant had gone safely over the place where this one was upset. *Held*, that there was evidence for the jury that the accident was due to a defective wagon provided by the defendant.

MORTON, J. This is an action of tort to recover for personal injuries received by the plaintiff on September 30, 1910, while in the defendant's employ, by reason of the tipping over upon him of a loaded lumber wagon. The case was submitted to the jury under instructions not objected to by either party. The jury found for the plaintiff and assessed the damages in the sum of $5,000. The defendant thereupon requested the judge* to rule that there was no evidence on which the jury could find a verdict for the plaintiff. The judge so ruled, and by agreement of parties reported the case to this court. If the ruling was erroneous, judgment is to be entered for the plaintiff for $5,000 with interest from the date of the verdict, and costs. If correct, judgment is to be entered for the defendant.

The case is a close one, but we are of opinion that there was evidence of due care on the part of the plaintiff and of negligence on the part of the defendant.

The plaintiff was an experienced teamster and testified that it was the first time that he had driven the wagon, and that so far as

* *Morton, J.*

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he knew or saw the wagon was all right. The wagon "was loaded a little farther forward" than a wagon would ordinarily be loaded. But it was for the jury to say what effect, if any, that had or should have had on the plaintiff's due care. When the wagon tipped over the plaintiff was "on the nigh side" where a teamster usually drives when walking, and he was, so far as appears, driving in the ordinary way in which a teamster drives a horse in the shafts when there is a horse in the lead being driven by another driver.* In the present case "the nigh side" happened to be the down hill side, but it could not be ruled that for that reason the plaintiff was as matter of law negligent in driving on that side. Moreover there was evidence tending to show that the wagon had partly got over the "six or eight-inch grade" which served for a sidewalk into the field where it was smooth and level when it tipped over. Neither could it be ruled as matter of law that there was anything in the manner in which the plaintiff and the men with him turned and drove across the street into the field where the lumber was to be deposited which showed that the plaintiff and the men with him were not in the exercise of due care, or which contributed to the accident. In addition to the testimony which was introduced at the trial the jury took a view and had the benefit of such observations as that enabled them to make of the place where the accident occurred. No claim is made that the plaintiff did not do all that he could to avoid the accident when he saw that the wagon began to tip, though the defendant contends that he was negligent in being where he was. We think that the question of the plaintiff's due care was for the jury.

The defendant was bound to furnish the plaintiff with a reasonably safe wagon. There was evidence tending to show that the perch of the wagon that tipped over was shorter than that of any other wagon owned by the defendant, and that that rendered the wagon less stable; that the front springs were old and the rear ones new, and that the body of this wagon tipped down forward while all the others were level; that the upper rocker plate instead of being flush with the lower one, as it should have been, was half

* At the time of the accident there was one horse in the shafts driven by the plaintiff and another horse in the lead driven by another driver. The "perch" of a wagon "is the wooden bar that connects the rear axle with the front one."

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an inch back, and that the holes in the rocker plates for the king bolt and the king bolt itself were worn, which rendered the king bolt loose and the wagon liable to tip or rock from side to side. There was also evidence tending to show that this wagon rocked or tipped more than other wagons belonging to the defendant and that when the wagon tipped over the king bolt broke in the place where it was worn. As already noted the wagon "was loaded a little farther forward" than was common, and it appeared that immediately before the accident the other two wagons of the defendant had gone safely over the place where this one tipped over. Taking all the facts and circumstances into account, we think that it was a question for the jury whether the accident was due to a defective wagon provided by the defendant, or to jolts and jars caused by the surface of the ground, or the manner in which the wagon was being driven into the field where the lumber was to be deposited. It follows that in accordance with the report the entry must be

Judgment for the plaintiff for $5,000, with interest from the date of the verdict, and costs.

The case was submitted on briefs.

C. H. Stebbins, O. Storer & C. E. Burbank, for the plaintiff.

H. C. Sawyer & W. H. Hitchcock, for the defendant.

NATHAN SALLINGER *vs.* COLLATERAL LOAN COMPANY.

Suffolk. May 22, 1913. — June 17, 1913.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DE COURCY, JJ.

Conversion. Sale, Conditional. *Damages,* In tort, Mitigation.

In an action for the alleged conversion of a diamond ring, where it appeared that the plaintiff had delivered the ring to a conditional purchaser, under a contract by which the title was to remain in the plaintiff until the purchase money was paid and the purchaser until such payment was not to sell or pledge the ring, and that such purchaser, without having paid for the ring, pawned it to the defendant, the presiding judge instructed the jury that the burden was upon the plaintiff to show that there had been a default on the part of the purchaser and consequently that at the time of bringing the action the plaintiff had the title to the ring and the right to its possession, and that, if he had such right, he still must

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prove a demand upon the defendant and a refusal to deliver the ring to the plaintiff. The jury returned a verdict for the plaintiff. *Held*, that the verdict was warranted, that the instructions were correct and that the defendant had no ground for exception.

In an action for the alleged conversion of a ring wrongfully pawned to the defendant by a conditional purchaser to whom the plaintiff had delivered it, where it appears that the plaintiff demanded the ring from the defendant who refused to give it up, such demand and refusal are proof of a conversion upon which the plaintiff's right to damages became complete, and, if at the trial the defendant offers the ring to the plaintiff in reduction of damages, the plaintiff has the right to refuse to receive it and to insist on full payment in cash.

TORT for the alleged conversion of a diamond ring. Writ in the Municipal Court of the City of Boston dated November 16, 1910.

On appeal to the Superior Court the case was tried before *Keating*, J. The material facts are stated in the opinion. The judge refused to rule at the request of the defendant that upon all the evidence the plaintiff was not entitled to recover. He also refused to make other rulings requested by the defendant, except as embodied in his charge, and gave the instructions which are described in the opinion.

During the trial the defendant offered to return to the plaintiff a diamond ring, which it asserted was the one pledged to the defendant by Capone, mentioned in the opinion. The ring was alleged to be in the same condition as when received by the defendant in pledge. The defendant offered to show in mitigation of damages that it had offered at the trial to return the property alleged to have been converted. The plaintiff objected and contended that the offer should not be considered, as it came too late, and that an unaccepted offer to return the ring could not be considered in mitigation of damages. The judge ruled that the offer thus made could not be considered in mitigation of damages, and refused to require the plaintiff to receive the ring, and excluded all evidence offered by the defendant to show that such an offer had been made during the trial. The defendant excepted.

The jury returned a verdict for the plaintiff in the sum of $127.94; and the defendant alleged exceptions.

The case was submitted on briefs.

C. W. Rowley, for the defendant.

A. K. Cohen & H. A. Mintz, for the plaintiff.

HAMMOND, J. This is an action for the conversion of a diamond ring delivered by the plaintiff to one Capone under a conditional

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sale, the terms of which so far as material to this case were that the buyer should pay $2 per week; that he should keep the ring in his possession in like good order and condition as when received, reasonable use excepted, and should not sell or attempt to sell, mortgage, pledge or let it; that the title to the ring should remain in the plaintiff until it was fully paid for, and that if the buyer failed to make any payment when due, or to keep any other of his agreements, he should surrender the ring to the plaintiff, "without process of law or on demand." Some time after the delivery of the ring Capone caused it to be pawned to the defendant to secure the payment by him (Capone) to the defendant of a loan of $40.

Upon the evidence we are of opinion that the questions, whether there had been a default in the payment of the money or in any other respect on the part of Capone, and whether before the action was brought there had been due demand made upon the defendant and a refusal by it to give up the ring, were for the jury. The jury were in substance instructed in language clear, apt and well calculated to help them, that the burden was upon the plaintiff to show that there had been a default on the part of the purchaser and consequently that at the time of the bringing of the action the plaintiff had the title to the ring and the right of possession of it, and that if he failed to prove a default the verdict should be for the defendant; and further, that even if there were a default the action could not be maintained without a demand first made. We see no error in the way in which the judge dealt with the case in the charge to the jury or with the rulings requested by the defendant. The defendant was the proper party upon whom to make the demand.

The right of action accrued as early at least as the time of the refusal of the defendant to give up the ring, and the right to damages then became complete. The plaintiff was not bound to receive at the trial the ring in part payment of the damages. He could insist on payment in cash.

Exceptions overruled.

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JACOB J. KAPLAN *vs.* WILLIAM GRAY & others.

Suffolk. December 5, 1912. — June 18, 1913.

Present: RUGG, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON, & DE COURCY, JJ.

Damages, In contract: liquidated. *Contract*, Construction. *Words*, "Liquidated damages."

Where there is an express stipulation that a sum of money deposited to secure the performance of a contract in writing shall be forfeited, in case of a breach of the contract by the depositing party, as "fixed, liquidated and ascertained damages," the parties are to be taken at their word, unless it is apparent from the terms of the entire contract and an examination of the subject matter that the forfeiture is to be treated as a penalty.

The owner of a patent for a lamp shade for road vehicles made a contract in writing, by which he licensed a certain person to manufacture the shade for one year and the licensee agreed to manufacture at least one thousand shades, each having the name and number of the patent, and to pay the patentee $1 for each shade so manufactured. It further was provided that the licensee should deposit $500 "as security for the faithful performance of this agreement," which at the termination of the contract was to be applied to the last five hundred shades manufactured, and that, if the licensee should fail to comply with the terms of the contract, the $500 deposited should be forfeited "as fixed, liquidated and ascertained damages." The licensee committed a breach of the agreement by manufacturing within the year only twenty-five shades instead of one thousand, and paid accordingly $25 instead of $1,000. The assignee of the rights of the owner of the patent brought an action against the licensee for an alleged balance of $475, computed by deducting the deposit of $500 and the payment of $25 from the $1,000 which he would have received if the contract had been performed. The defendant contended that under the terms of the contract the $500 deposited by the defendant must be accepted as liquidated damages. *Held*, that the plaintiff by retaining as his property the $500 deposited had received all that he was entitled to under the agreement.

BILL IN EQUITY, filed in the Supreme Judicial Court, as amended, on January 6, 1912, against the former and present members of a partnership carrying on business under the name of Gray and Davis, setting forth a contract in writing dated January 6, 1909, which is described in the opinion, made by the defendants Gray and Hollander with Charles G. Wridgway, who assigned his rights thereunder to the Wridgway No-Glare Shade Company which assigned its rights to the plaintiff, and seeking to establish a debt

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from the defendants Gray and Hollander to the plaintiff of a balance of $475 and to reach and apply the interest of the defendant Gray in the partnership of Gray and Davis to the payment of such debt.

The defendants demurred to the bill for want of equity and on the ground that it appeared by the bill that there had been an accord and satisfaction between the parties.

The case was heard by *Braley*, J., who sustained the demurrer and ordered that the bill be dismissed with costs. At the request of the plaintiff the justice reported the case for determination by the full court, with a stipulation of the parties that, if the demurrer was sustained, the bill was to be dismissed with costs, but that, if the demurrer was overruled, judgment was to be entered for the plaintiff in the sum of $475 with costs and interest, if as matter of law the full court should determine that the plaintiff was entitled to interest.

The case was argued at the bar in December, 1912, before *Hammond, Loring, Braley, & De Courcy*, JJ., and afterwards was submitted on briefs to all the justices.

J. B. Studley, (*R. S. Hoar* with him,) for the plaintiff.

R. Y. FitzGerald, (*W. A. Cole* with him,) for the defendants.

De Courcy, J. The plaintiff's right to recover depends upon the construction of a written agreement between Charles G. Wridgway, to whose interest he succeeds by assignment, and the defendants Gray and Hollander, formerly copartners under the name of Gray and Davis, and hereinafter called the defendants.

Wridgway was the owner of certain letters patent for a lamp shade for road vehicles. By the agreement in question he licensed the defendants to manufacture the shades for the period of one year; and further agreed not to permit any other lamp manufacturer in the United States to make them during the continuation of the contract, to protect the defendants in any litigation concerning the same and to protect the patent, if necessary; and also to renew the contract for three years if they should have complied with the terms thereof. The defendants on their part agreed to manufacture at least one thousand shades, the same to be of a quality such as would not injure the value of the patent, and each shade to bear the patent number, the inscription "Wridgway No-Glare Shade," the date of patent and the consecutive license

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number; and also to include the said inscription in all advertising matter. Further they were to pay $1 for each shade manufactured, to settle accounts monthly and to keep and render monthly an account of the number of shades manufactured.

The agreement contained the following provisions:

"The sum of $500.00 (five hundred dollars) is hereby deposited by parties of the second part, with party of the first part, as security for the faithful performance of this agreement on their part to be performed, and said $500.00 (five hundred dollars) is to be applied to the last five hundred (500) shades manufactured by the parties of the second part, at the end or termination of this contract.

"It is further agreed that if parties of the second part shall fail to comply with terms of this contract, and shall fail to properly number all shades manufactured by them, or to make settlements as hereintofore [*sic*] stated, the said sum of $500.00 (five hundred dollars) deposited, as aforesaid, shall be forfeited to party of the first part, as fixed, liquidated and ascertained damages, and the contract between the parties hereto shall terminate and become null and void."

The only breach of this agreement specified in the bill of complaint is the failure to manufacture and pay for more than twenty-five shades. The plaintiff contends that the provision relating to the deposit of $500 should be treated as a penalty and void, that the actual damages should be assessed, and that the defendants, by failing to manufacture the guaranteed number of lamps, became indebted to him in the sum of $1,000 with interest thereon. He undertakes to apply on account of this sum the $25 received from the defendants for the shades manufactured, and the $500 deposited by them, and now seeks to recover the alleged balance of $475 with interest.

We are of opinion, however, that a fair interpretation of the agreement makes it manifest that the parties intended this $500 to be liquidated damages and not a penalty in the event of a breach. In fact they have expressly so stated in the language of the second paragraph above quoted, designating the money deposited as "fixed, liquidated and ascertained damages." And as was said by Holmes, C. J., in *Guerin* v. *Stacy*, 175 Mass. 595, 597, "we heartily agree with the Court of Appeals in England that so far as

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precedent permits the proper course is to enforce contracts according to their plain meaning and not to undertake to be wiser than the parties, and therefore that in general when parties say that a sum is payable as liquidated damages they will be taken to mean what they say and will be held to their word."

It is true that the use of the words "liquidated damages" is not decisive, and in some cases, notwithstanding such designation, it may be apparent from the terms of the entire contract and an examination of the subject matter that the money is to be treated as a penalty. But such is not the situation here. The contract contained numerous stipulations for a breach of which it would be difficult, if not practically impossible, accurately to determine the damages. Such, for instance, are those requiring the defendants to keep up the quality of the shades, to mark and number each one as provided in the agreement, to keep and render accurate accounts, and to settle for royalties monthly. Considering the subject matter of the contract, it was a territorial right for a newly patented lamp, the success of which was problematical. Apparently the defendants were willing to risk not more than $500 in the venture in addition to the $1 to be paid for each lamp shade they could find a customer for; and the plaintiff was willing to accept the certainty of that amount, with the prospect of more in the event of the defendant's success in introducing the shades to their customers.

It is urged by the plaintiff, however, that the first paragraph quoted from the agreement brings the case within the general rule of construction that where a sum is to be paid in case of a breach of any of several distinct stipulations of various importance, and some of them are for the payment of fixed amounts of money, it will be construed as a penalty. *Fisk* v. *Gray*, 11 Allen, 132. *Wallis* v. *Smith*, 21 Ch. D. 243. While the agreement is not free from doubt, on the whole we are of opinion that this rule has no application here. In the first paragraph the parties were providing for what would be done if the contract should be complied with, and the full number of one thousand shades manufactured. In that event the $500 was to be security, not in the sense of a penalty, but simply as a fund from which payments should be made for the last five hundred shades manufactured. In the second paragraph the parties made provision for the event of a breach of the

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agreement, and therein stipulated for liquidated damages as above stated. It was not one of the stipulations that the defendants should make a payment of $1,000 or any other definite sum at the end of the year, or on any fixed date, but that they should manufacture one thousand shades, for which they were to settle monthly. It is also somewhat indicative of the intention of the parties to make this $500 liquidated damages that it was a less sum than the defendants would otherwise be liable to pay on failure to make and pay for one thousand shades. Penalties usually provide for the payment of a larger sum on the failure of a party to pay a less amount.

A majority of the court are of opinion that the plaintiff, by retaining as his property the $500, has received all to which he is entitled under the agreement, and that the demurrer must be sustained. *Guerin* v. *Stacy*, 175 Mass. 595, 597. *Garst* v. *Harris*, 177 Mass. 72. *Morrison* v. *Richardson*, 194 Mass. 370. In accordance with the terms of the report the bill is to be dismissed with costs.

So ordered.

HAROLD A. STORER *vs.* JEREMIAH F. DOWNEY.

Suffolk. January 16, 1913. — June 18, 1913.

Present: RUGG, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Municipal Corporations, By-laws and ordinances, Veto of mayor. *Constitutional Law*, Police power. *Garage*. *Cambridge*.

The enactment of an ordinance by a city under authority of R. L. c. 104, § 1, providing that "no building shall be erected for or converted to use as a garage unless such use is previously authorized by the board of aldermen," is a valid exercise of the police power which does not exceed the scope of the statute.

Under St. 1907, c. 565, § 3, the mayor of Cambridge, in returning without his approval an order of the board of aldermen granting authority to erect a garage in that city, complies with that statute if he states objections in writing founded on considerations of municipal policy other than "the prevention of fire and the preservation of life," which are named in R. L. c. 104, § 1.

PETITION, filed on November 12, 1912, for a writ of mandamus addressed to the superintendent of public buildings in Cambridge ordering him to issue to the petitioner a permit to erect a garage at number 41 on West Street in Cambridge.

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The facts which appeared by the petition, the answer of the respondent and the annexed exhibits are stated in the opinion. The case came on to be heard before *Morton*, J., who reserved it for determination by the full court.

F. J. Carney, (*C. E. Lawrence* with him,) for the petitioner.

J. F. Aylward, for the respondent.

RUGG, C. J. This is a petition for a writ of mandamus by a landowner against the superintendent of public buildings of Cambridge.

An ordinance of the city of Cambridge (passed under the authority of R. L. c. 104, § 1), provides that "No building shall be erected for or converted to use as a garage unless such use is previously authorized by the board of aldermen." This is a valid exercise of the police power. The disagreeable incidents of a garage are well known. They have been adverted to frequently in recent decisions of this court. See, for example, *Riverbank Improvement Co.* v. *Bancroft*, 209 Mass. 217, 223; *Noyes* v. *Cushing*, 209 Mass. 123, 126, and cases cited. Oil and gasoline, almost inevitably stored and used in them, are so highly inflammable and explosive that they may increase the danger of fire, no matter how carefully the building be constructed nor how non-combustible its materials. Although lawful and necessary buildings, they are of such character that regulation of the place of their erection and use is well within settled principles as to the police power.

The ordinance in its terms differs in no essential particular from many others which have been sustained. *Salem* v. *Maynes*, 123 Mass. 372. *Commonwealth* v. *Hubley*, 172 Mass. 58. *Newton* v. *Joyce*, 166 Mass. 83. *Worcester Board of Health* v. *Tupper*, 210 Mass. 378. The case is plainly distinguishable from *Commonwealth* v. *Maletsky*, 203 Mass. 241, and *Goldstein* v. *Conner*, 212 Mass. 57, and the cases collected in each of these opinions, where either an innocuous matter has been made utterly dependent upon the action of a public board or a possibly harmful business upon that of a subordinate officer, or the ordinance has been broader than the statute authorized. Here the public board itself is empowered to deal with a subject which may endanger the safety of persons and property, and the ordinance does not exceed the scope of the statute.

The petitioner duly presented a petition to the board of aldermen,

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which passed an order granting him authority to erect the garage. The mayor vetoed the order, giving as his reason "not because it appears to be necessary . . . for the prevention of fire and the preservation of life," but because he thought some policy respecting garages in residential districts should be adopted by the city and because he was opposed to their establishment in residential districts contrary to the sentiment of abutting property owners. It is contended that a veto for such reasons is a nullity and that the order of the board of aldermen is effective notwithstanding the attempted veto. This contention cannot be sustained. The mayor stated his objections in writing at some length as required by St. 1907, c. 565, § 3. Hence the difficulty which was held fatal in *Mayor of Lowell* v. *Dadman*, 191 Mass. 370, does not exist. There is no requirement that his objections shall be based upon any defect in law in the order, nor that they shall be such as may commend themselves to any outside tribunal. The object of the statute is that the mayor shall state his reasons in order that they may be weighed by the body passing the order, upon whom alone rests the duty of deciding whether they are sound. The objections urged by the mayor in the present case are not whimsical or absurd, but obviously grounded upon what seemed to him a wise municipal policy. They were such as might rightly be considered by the board of aldermen, and their failure to pass the order, the mayor's objections to the contrary notwithstanding, rendered the order nugatory.

Petition dismissed without costs.

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MARY E. JOHNSON, executrix & trustee, *vs.* MARY E. JOHNSON, individually, & others.

Worcester. March 3, 1913. — June 18, 1913.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DE COURCY, JJ.

Devise and Legacy. Trust.

A testator by his will left the residue of his estate to trustees to hold and keep it safely invested and to pay over the income as it should be received to the testator's wife "for the support and maintenance of herself, and the care, maintenance, and education of our children, during her life, or until she shall marry again." The will then directed that, if the income of the estate should at any time prove inadequate for such support, maintenance and education, the trustees should devote so much of the principal sum as might "be found necessary for that purpose," that the testator's wife "be allowed to be the sole judge in that respect, and that for the purposes aforesaid she use said principal as freely and unrestrictedly as if the same had been absolutely given to her." The will contained minute and complete directions for the disposition of the principal of the trust fund upon the various possible contingencies in the future, and provided what disposition should be made of the principal and income in case of the widow's marriage, but contained no further provision as to the disposition of the income received by the widow. *Held*, that the income was received by the testator's widow subject to a trust for the reasonable support of herself and her children until her death or marriage, and that so much of the income received by the widow as was not needed for the reasonable support of herself and her children was held by her as her own property free from trust.

BILL IN EQUITY, filed in the Probate Court for the county of Worcester on August 12, 1910, by the executrix of and the trustee under the will of Iver Johnson, the late husband of the petitioner, for instructions as to the disposition and distribution of the income of the residue of the estate of the testator.

On appeal the case was submitted upon the pleadings and an agreed statement of facts to *Morton*, J., who reserved it for determination by the full court.

The will of Iver Johnson was dated March 24, 1877. In it the petitioner and Nahum M. D. Hayward of Worcester were named as executors. By a codicil dated July 19, 1895, the appointment of Nahum M. D. Hayward as executor was revoked and the petitioner was nominated as sole executrix. There was a recital that the sole purpose of the testator in executing the codicil was

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to revoke the appointment of Hayward as executor. Iver Johnson died on August 3, 1895, and the will and codicil were proved on September 3, 1895.

The first article of the will directed the payment of the testator's debts and funeral expenses and of expenses incurred in carrying out the provisions of the will. The second and third articles of the will were as follows:

"Second. All my household furniture, wearing apparel, plate, linen, china, ornaments of the person, books, pictures, house adornments, and whatsoever other movable chattels of a like description may be in or about the house and premises in which I may be residing at the time of my decease, I give, and bequeath unto my dear wife, Mary Elizabeth Johnson, for her own sole use and benefit. To have and to hold the same to her, the said Mary Elizabeth Johnson, and her executors, administrators and assigns, to her and their use forever.

"Third. And as to all the rest, residue and remainder of my estate, real, personal or mixed, of which I may die seized and possessed, or to which I may in any way be entitled at the time of my decease, whatever the same may be, wherever it may be or be situated, or however it may be known, designated or described, including all remainders and reversions, I give, devise and bequeath the same unto my executors hereinafter named.

"To have and to hold the same to them and their heirs, executors, administrators and assigns.

"In trust, however, for the uses and purposes following, and none other, that is to say:

"1. The same to hold, manage, invest and reinvest from time to time in safe and profitable securities, but always in such way and manner as to ensure absolute safety to the principal so far as the same can possibly be done.

"2. The income thereof, as it shall become due and payable, and be received by them to pay over to my said wife, Mary Elizabeth Johnson, for the support and maintenance of herself, and the care, maintenance, and education of our children, during her life, or until she shall marry again.

"3. If the income of said estate shall at any time, from any cause, prove inadequate for such support, maintenance and education then to devote so much of the principal sum as may be found

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necessary for that purpose; and I direct that my said wife, Mary Elizabeth Johnson, be allowed to be the sole judge in that respect, and that for the purposes aforesaid she use said principal as freely and unrestrictedly as if the same had been absolutely given to her.

"4. At the decease of my said wife, Mary Elizabeth Johnson, if she shall not have married again, to pay over and distribute what may remain of said fund to and among all my children who may then be living, in even and equal proportions, the child or children of any deceased child to take by right of representation.

"5. If my said wife Mary Elizabeth, shall again marry then at the time of such marriage, to pay over and distribute two-thirds part of whatever amount of said fund may then remain unexpended to and among all my children who may then be living, equally, the child or children of any deceased child to take by right of representation; and the remaining third part to continue to hold, and to pay over the income thereof as it becomes due and payable and is received by them to my said wife, Mary Elizabeth, during her life, and at her decease to pay over and distribute said third part of said principal to and among all my children in the manner aforesaid.

"6. If, at the time of the marriage of my said wife Mary Elizabeth, if she shall again marry, no child of mine shall be living, then to pay over to her in the manner aforesaid, the net income of all said principal fund during her life; and at her decease, to pay over and distribute said principal fund to and among my heirs at law, according to the laws of distribution of intestate estates, then in force in this Commonwealth.

"7. If, at the decease of my said wife, whether she shall marry again or not, no child of mine shall be living, then at her decease, to dispose of said principal fund in the manner provided in the last preceding section."

H. H. Fuller, for the plaintiff, stated the case.

H. Parker & F. T. Field, (*A. G. Buttrick* with them,) for Mary Elizabeth Johnson, individually, J. Lovell Johnson and Mary L. Johnson.

S. L. Whipple, (*D. I. Walsh & A. Lincoln* with him,) for Walter O. Johnson.

A. Hemenway, (*E. H. Abbot, Jr.*, with him,) for Fred I. Johnson.

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T. H. Gage, guardian *ad litem*, submitted a brief.

HAMMOND, J. By the third article of the will of Iver Johnson, the residue of his estate was devised and bequeathed to trustees to hold and keep the same safely invested and to pay over the income as it shall be received by them to his wife "for the support and maintenance of herself, and the care, maintenance, and education of our children, during her life, or until she shall marry again." By agreement of parties the case is reserved by a single justice, upon an agreed statement of facts, for the consideration of the full court "solely for the interpretation of those provisions of the will which relate to the disposition of such income." Questions as to the actual amount of the income as distinguished from capital are not here reserved.

The clause above quoted was written by a "skilled attorney at law of wide experience in preparing and drafting wills," is brief, simple and direct in form, and upon its face would seem to be easily understood; and yet in view of the decided cases the parties concerned do not agree as to its meaning; and its interpretation is attended with some difficulty.

The widow contends (1) that she receives the income absolutely as her own property, free from any trust in favor of the children or liability to them; or (2) in the alternative, that the trust, if any, in favor of the children extends only to such an amount as may be necessary for their proper care, maintenance and education, and that any excess above that amount belongs absolutely to her. Two of the children, namely, J. Lovell and Mary, seem to agree with the widow in her views. Walter, one of the sons, contends that the whole income was impressed with a trust in favor of the widow and children, to last during the term of the trust; that the widow has full and absolute discretion as to how much should be expended for her own support and for the care, maintenance and education of each of her children; that any part of the income temporarily in her hands and not needed for the time being for such expenditures still remains charged with the trust, and that no part of the income goes to the widow as her own property or can be appropriated by her as such, and that, at the termination of the trust, "any unexpended income should then be distributed as a part of the trust fund, or, at least, according to the same method." Fred, the eldest son, contends that the widow receives the income upon

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trust for herself and the children, equally to be divided between them, that is, one fifth to each. The guardian *ad litem* contends that the widow takes the income charged with a trust, to secure each of the beneficiaries, the widow and children, a maintenance, that the amount to which one of the beneficiaries is entitled may be more or less than that to which another is entitled, depending upon circumstances reviewable by the court; that the whole annual income need not be expended each year; that the exigencies of one period may require contraction at another; and that unappropriated income will ultimately follow the principal.

The questions raised by these various contentions may be briefly stated thus: 1. Does the widow receive the income absolutely as her own property, or in trust? 2. If in trust, what is the nature and extent of that trust?

1. As to the first question. In the construction of any clause of a will, the cardinal rule, as often has been said, is to ascertain the intention of the testator. And this is to be done by reference to the express language of the clause under consideration, to the other parts of the will, to the dominant purpose of the testator as shown by the whole will, to the circumstances under which the will was executed, including among other things the situation, pecuniary and in other respects, of those having as members of his family or otherwise a natural claim upon him for recognition or assistance, as well as the relations sustained by him to all the legatees; and to the decided cases so far as they tend to throw light.

The original will was executed on March 24, 1877. Although neither the age nor the occupation of the testator at that time is expressly stated in the agreed statement of facts, still it fairly may be inferred from the facts agreed, including the will itself, and the oral statements made at the argument, that at that time he was not beyond middle age and was in the "full vigor of health," that he was possessed of a comfortable household establishment, and that as an employer he was engaged in a manufacturing business of good promise, susbtantially the same as that which, as carried on and developed subsequently by him during his lifetime and by the executor since his death, has been very profitable. His family consisted of himself, his wife, then twenty-eight years of age, and two boys aged respectively about five and a half years,

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and nine months. Whether he had any other immediate relatives does not appear. From the glimpses we get of him, he appears at that time to have been busily engaged in a profitable manufacturing business of some magnitude and promise, and to be very happy in his domestic relations, and to have been absorbed in these two things. He fairly may be assumed to have known the risks of a manufacturing business, the liability to loss as well as the chance of gain, and the business skill required to avoid the one and reach the other.

In full health, bodily and mental, this man thus situated concludes to make his will. He does not intend to make any bequests outside his immediate family. To his family alone, so far as any survive, is all to go. But in his mind there is a distinction between income and principal, and in a general way he desires that, if practicable, only the income of the bulk of his property shall be spent during the life or the widowhood of his wife, leaving the principal to stand well invested and to be distributed among his issue thereafterwards. He is somewhat solicitous about what shall be done with his manufacturing interests existing at his death. But he wants everything he leaves to be safely invested, and in view of the risks of continuing the business he thinks it best on the whole that his interests in that connection be closed up as soon as possible, without undue sacrifice. His idea is that for a while at least the family shall be kept together in the home in existence at the time of his death. And he knows not how soon the change, to meet the consequences of which he has resolved to make preparations, may come. In entering upon this work he does not rely upon himself, but he calls to his aid a skilled attorney of wide experience in drafting wills. They confer together, and the will is drawn. After making provision for the payment of all obligations the mind of the testator seems first to turn to the sanctuary of his home; and he gives all his household furniture and every movable article (naming them by classes in considerable detail) which may be in or about the house or premises in which he may be residing at the time of his decease, unto his "dear wife, . . . for her sole use and benefit." Having thus provided for the continuance of the home, in which he has lived with his family, so far as respects the familiar material things in or about it, he passes to the consideration of the rest and residue of his property. He intends to put it in trust. He

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has decided to appoint his wife and Hayward, then in his employment to be the sole executors of his will, and he gives this residue to them in trust to keep the same safely invested, and to pay over the income to his wife for the support and maintenance of herself and the care, maintenance and education of his children during her life or until she shall marry again. And then it occurs to him that the income may prove inadequate for those purposes, and to meet this possible situation the trustees are to devote so much of the principal as may be found necessary for those purposes, and he desires that his wife shall be allowed to be the sole judge in respect to this use of any part of the principal, and that for those purposes she should use said principal as freely and unrestrictedly as if the same had been absolutely given to her.

After the death of his wife, "if she shall not have married again," the fund is to be distributed equally among his children then living, and the issue of any deceased child taking by right of representation. Should the wife remarry, then two thirds of the fund is to be distributed among the children and the issue of a deceased child in like manner, and the income of the third kept in trust shall be paid over to the wife during her life, and at her death this one third of the fund shall be distributed in like manner among the children. If at the time of the marriage of the wife no child of the testator be living, then the whole income of the fund shall be paid to her during her life, and at her death the principal shall be distributed among the testator's heirs at law. A similar disposition is made of the principal fund if at the decease of the wife, whether she has married or not, there be then no child living.

For the purpose of making the settlement of the estate as easy and expeditious as possible, the executors, or whoever may execute the will, are given large powers as to the sale of real estate. Finally, his wife and Hayward, then in his employment, are named to be executors without sureties on their bonds.

In general outline the plan disclosed and crystallized in the will is simple. It does not contemplate the use of one dollar of the principal for the support of his wife or children unless the income should prove inadequate, and even then only so far as his wife may think necessary. His purpose is that with that exception neither she nor any of the children shall touch the principal during the life of the wife unless she marry again. He is providing for the

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future. His wife is twenty-eight years of age. There is nothing to show that she was not in sound health. She might yet live for half a century longer, and in any event might reasonably be expected to live to threescore and ten, a period forty-two years after the will was executed. He might reasonably anticipate that their union might be blessed with the birth of other children, and there is nothing to show that he was more solicitous for the support of his wife than for that of his children. He was not providing for the support of a child of maturity whose conduct had shown that he could not be safely intrusted with money. The character of each of his children, present or prospective, was still to be developed. It fairly may be assumed that he expected on the one hand that in case of his death his children would be during their minority in the care of his wife, at least until she married again, and on the other hand that as they came respectively to maturity they would take their places as efficient members of society and make their own homes and become heads of families. He evidently had confidence in the business ability of his wife and her maternal love for their children. He made her one of the executors who were to act as trustees, and in case of the inadequacy of the income for the purposes of support she was to be the sole judge as to the amount of the principal required to make good the deficiency.

What did this man thus circumstanced, in the will thus framed under the advice of a skilful and experienced lawyer, mean when he provided that the income should be paid to this woman, his wife, "for the support and maintenance of herself, and the care, maintenance, and education of our children, during her life, or until she shall marry again"? In the will itself there are plain indications that he by the aid of the attorney, knew how to use words apt to create an absolute gift free of trust. Such is the gift to the wife of the household furniture and other articles about the home, for her sole use and benefit. There can be no doubt as to the nature of this gift. It is absolute and free from trust, and the intent that it shall be so is expressed in words that admit of no other interpretation. And, what is more significant, the same characteristic is shown in other parts of the will with reference to this very matter of income. By the fifth article it is provided that in case of the marriage of the widow, any child of the testator being then alive, the income from one third of the trust fund shall

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be paid to her during her life; and by the sixth article, if upon her marriage there be no child then living, the income of the whole fund is to be paid to her during her life. There can be no doubt as to the meaning of these two clauses so far as respects the income payable to the wife. The gift is absolute and free of trust. In neither case is there any need of a provision for the children, in the first, because two thirds of the trust fund is distributed among them, and in the second, because by the hypothesis there are no children. In a word, there are in this will three separate clauses, one concerning the gift of household furniture and similar articles, and two concerning the income of this very fund, in each of which clauses it appears that where the testator intended that the children should have no interest in the gift he knew how to express that intention in apt, clear and unambiguous language.

The clause under consideration is in different language. There can be no doubt that until the marriage or death of the widow, whichever should first happen, in this clause and in this clause alone is there any provision out of the income for the children either during their minority or majority. No matter how large it may be, not a dollar of it is theirs by right except under this clause. And the testator knew this. Knowing this, instead of leaving it to his wife in words similar to those used by him in the other places of the will he provides that it shall be paid to her for her support and the support of her children. In his own mind there is an intimate connection between this income and the support of the children, and it is the only place in the will where he seems to have considered this relation. And the suggestion in his own mind seems to have been that until the death or marriage of the widow the children must look to this income, if anywhere, for care, maintenance or education. It is impossible to read this will without coming to the conclusion that he intended the children should have their support out of the income. That intention is clearly expressed. It is the intention naturally suggested by the circumstances under which the will was executed. And this intention was expressed not as an expression of confidence that its execution safely could be left to the wife, nor in words of recommendation, hope, entreaty or desire, but as a command, or in other words as his testamentary will.

Such would seem to be the irresistible conclusion upon a simple

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reading of the will in the light of all the circumstances. But there is something more. The testator was domiciled in this State, and may be fairly assumed to rely upon the law of this Commonwealth for the rules to be applied in the interpretation of his testamentary words. What was the condition of the law of this Commonwealth at that time as indicated by the cases already then decided? The will was executed in 1877. In 1861, the case of *Chase* v. *Chase*, 2 Allen, 101, was decided, and was reported in the regular reports as early at least as 1862. In this case there was a trust fund, the income of which was to be paid to the testator's son every year during his natural life, "for the support of himself and his family and the education of his children," with remainder upon his decease to his issue. Bigelow, C. J., giving the opinion of the court, uses this language: "The intent of the testator to give the benefit of the income of the trust fund created by his will to the wife and children of his son Philip, as well as to his son, is clear and unequivocal. It was intended for their joint support, and for the education of the children. The only question arising on the construction of the will is, whether the income of the trust fund when received by the son is held absolutely by him to be disposed of at his discretion, or whether he takes it in trust, so that the wife and children can seek to enforce its due appropriation in part for their benefit in a court of equity. We cannot doubt that the latter is the true construction; otherwise it would be in the power of the son to defeat the purpose of the testator by depriving his family of the support and education which was expressly provided for by the will. . . . It can make no difference in the application of the principle, that the person who is to receive the income also takes a beneficial interest in it for his own support." In *Andrews* v. *Bank of Cape Ann*, 3 Allen, 313, the testator bequeathed property to his wife "for the maintenance and the bringing up and educating my children [G. and J.], as long as she remains my widow," and it was held that the wife held in trust. A similar result was reached in *Smith* v. *Smith*, 11 Allen, 423, where the bequest was to the wife "for her benefit and for the proper maintenance and education of my two daughters," and in *Loring* v. *Loring*, 100 Mass. 340, where the bequest was to the wife "for her benefit and support and the support of my son John O. Loring, whilst she remains unmarried." In this last case Hoar, J., speak-

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ing for the court, said (p. 342): "To give property to one person, for the support of another, is certainly sufficient to show that a trust is intended in favor of the latter." *Loring* v. *Loring* was decided in 1868. See also *Whiting v. Whiting*, 4 Gray, 236; *Hyde* v. *Wason*, 131 Mass. 450; *Buffinton* v. *Maxam*, 140 Mass. 557, in which Morton, C. J., says: "Where personal property is bequeathed to one for the support of another, a trust is imposed upon the property, and the taker holds it in trust for the purpose named," and *Phelps* v. *Phelps*, 143 Mass. 570 (and cases therein cited), in which Gardner, J., quotes with approbation the rules stated by Hoar, J., in *Loring* v. *Loring*, 100 Mass. 340.

We are aware of the fact that the cases in other jurisdictions are in conflict with each other, and some do not give the same weight to words like those under consideration as this court does. See for example *McCroan* v. *Pope*, 17 Ala. 612; *Dee* v. *Dee*, 212 Ill. 338; *Seamonds* v. *Hodge*, 36 W. Va. 304; *Small* v. *Field*, 102 Mo. 104; *Whitridge* v. *Williams*, 71 Md. 105; *Crandall* v. *Hoysradt*, 1 Sandf. Ch. N. Y. 40. In many of the cases however the conflict is more apparent than real, since the circumstances of the cases are different; and the weight of authority seems to be with the general view taken by this court. We also give due consideration to the suggestion that the proposition, stated by Hoar, J., and reported in substance in two subsequent cases above mentioned, is not to be accepted as a rule necessarily overruling every other rule of interpretation. It is simply one rule of construction and as such is to have its legitimate effect under all the circumstances of the particular case.

It is unnecessary to pursue this branch of the case further. We do not think that the provision as to the disposition of the principal required to make up any deficiency of the income is of much bearing. For reasons above set forth we can have no doubt that this income is held by the wife not as her absolute property, but impressed with a trust for the support of herself and her children.

There is nothing in *Rich* v. *Rogers*, 14 Gray, 174, or *Johnson* v. *Bridgewater Iron Manuf. Co.* 14 Gray, 274, or *Pitts* v. *Milton*, 192 Mass. 88, relied upon by the widow, which is inconsistent with this result.

We have considered the case as if there had been no codicil.

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The codicil, executed eighteen years after the will and about two weeks before the testator's death, simply revoked the appointment of Hayward as executor and ratified and confirmed the will in every other respect. Notwithstanding the increase in the number of children, and the gifts made by the testator to his wife shortly before his death, and other circumstances existing at that time as disclosed in the agreed statement of facts, we think that the meaning of the clause under consideration remained unchanged.

2. As to the nature and extent of the trust. The trust in substance was for the support of the widow and children until her marriage or death, whichever event should first occur, and within that time was to continue not only during the minority of the children but afterwards during their respective lives. At the time of the execution of the will there were only two children, each of tender age, and when the codicil was executed there were four children, of whom Fred, the eldest, was in his twenty-fourth year and Mary, the youngest, in her tenth year. Manifestly the amount required for the support of the five beneficiaries would vary from time to time. There is no qualifying adjective or phrase like "necessary," "comfortable" or "at the discretion" of the wife. Of course the support must be reasonable, and what is reasonable depends among other things upon the actual physical needs of the beneficiary, his station in life social and otherwise, the demands to be met and the amount of the income. What might be regarded as reasonable under one set of circumstances might not be so regarded under another, even if the income remained the same; and what might be regarded as sufficient when the income was small might not be deemed such when the income was larger, even although there was no other change in the situation. The support is not what the widow considers reasonable, but what the law declares to be such. And although it is the duty of the widow, in whose hands lies the money, to decide in the first instance what is reasonable so that she may perform her trust, the beneficiary, if thinking himself aggrieved, may apply to the court for a revision of that decision; and whether the decision be made by the widow or by the court, the question is always the same, namely, what is a reasonable support under the circumstances? To this each beneficiary is entitled, and to this is the income in

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the hands of the widow to be applied. It is not a case where the amount to be expended depends upon the discretion of the widow, and where the question before the court is whether the discretion has been exercised in good faith.

But it appears from the agreed statement of facts that this income referred to in the article under consideration has exceeded the amount which the petitioner has expended, or in her judgment, exercised in good faith, has heretofore needed to expend for the support and maintenance of herself and the care, maintenance and education of her children. This is not a statement that it exceeds the amount which the law would deem reasonable, but from the trend of the remarks made at the oral argument we infer that the amount of the surplus is greater than the widow thinks would in any view be regarded as reasonable. Of course it is her duty to execute the trust, and to make reasonable preparations to meet contingencies, and the surplus of one year may be needed to make up the deficiency in another. But what is to be done with the surplus of income not required for the due execution of the trust?

It is to be noted that the will separates the income from the principal. After the income is paid to the widow it is no longer a part of the main trust fund, but it is subject to a new trust; and there is no express provision in the will that this surplus of income after it is paid to the wife, shall ever go back to the trust fund from which it was separated. On the contrary it would seem from an inspection of the will that the idea of the testator was that there was no occasion to pursue the income after it reached the hands of the widow further than to provide for her support and that of his children. Possibly he did not anticipate that there would be a surplus. But however that may be, although he gives very minute and complete directions for the disposition of the principal of the trust fund in the various possible contingencies of the future, he nowhere makes any further disposition of the income received by the wife under the clause in question. That income we have seen is subject to a trust. Upon the whole we are of opinion that the surplus remaining in the hands of the widow after the execution of the trust does not pass to the heirs as undivided estate, but under the third article to the widow as her own property. In other words, she holds the income not upon a trust

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but subject to a trust. Such a construction seems to be in conformity with the dominant purposes of the testator. Under the circumstances of this case we think that the principle of equal division among the *cestuis que trust* which sometimes has been applied, as in *Proctor* v. *Proctor*, 141 Mass. 165, *Jackman* v. *Nelson*, 147 Mass. 300, and *Jubber* v. *Jubber*, 9 Sim. 503, is not here applicable.

The result is that the income paid to the widow is held by her subject, during her widowhood or life, to a trust for a reasonable support of herself and her children, and that so much of the income as is not needed for the execution of that trust is held by her as her own property free from trust. There should be a decree to that effect.

So ordered.

FRANK D. BROWN & another *vs.* GEORGE A. METCALF.

Middlesex. March 10, 1913. — June 18, 1913.

Present: RUGG, C. J., HAMMOND, LORING, SHELDON, & DE COURCY, JJ.

Evidence, Ancient plans.

Upon the trial of a question as to a boundary of real estate, an ancient plan, produced from proper custody, purporting to be a plan or an office copy of a plan made by a well known surveyor of the day, which is proved to have been used in some transaction with a third person by a predecessor in title of the party offering it in evidence to show the land then claimed by him, properly may be admitted in evidence, although such plan is without the signature of any maker and there is no evidence to indicate whether it is an original or a copy.

HAMMOND, J. This is a petition for the registration of title to a tract of marsh land and flats situated in the city of Everett, on the northeasterly side of Mystic River. The petitioners claimed to be the owners of the whole of the land, while the respondent claimed to be the owner of the westerly half of it. The petitioners are the owners of the record title to what in 1795, in a deed thereof from one Green to one Stone, is described as "a piece of salt marsh land and sedge grass that is called a sedge island;" and the petitioners and the respondent between them own the record title

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to a tract of salt marsh and sedge ground conveyed later in 1795 by said Green to one Russell, lying to the west of that conveyed to Stone as aforesaid, the westerly half of this Russell marsh belonging to the respondent and the easterly half to the petitioners. The respondent also owns a tract of marsh land called formerly the Pierce marsh, situated to the west of the Russell marsh.

The main controversy at the trial was as to the location of the westerly boundary line of the petitioners' land. That involved an inquiry into the location of the Pierce and Russell marshes and the sedge island with reference to the tract of land covered by the petition, and the case necessitated a determination of the location on the ground of lines established more than a century ago across marshes and flats on the Mystic River which, as early as 1850, had been so changed by excavation that the original landmarks had to a considerable extent disappeared. Such an inquiry under such circumstances would be likely to be attended with considerable difficulty; and such seems actually to have been the case.

The case is before us upon a report of the Land Court,* and the only question is whether a certain ancient plan called the "Fuller plan," introduced in evidence by the petitioners, was wrongly admitted at the trial. After stating the evidence as to the plan, the report states that the plan was admitted at first *de bene* and continues as follows:

"At the conclusion of the arguments I took the papers and reserved decision, and thereafter made a careful study of all of the plans and records offered, including the plan or sketch in question.

"I found the latter to be a substantially accurate representation of the creeks, marsh and other topographical features of the tract in dispute, as it then existed, to such a degree that its lines can be substantially identified upon the ground to-day. I then transmitted to the recorder's office a decision, which was filed, and forms a part of the record in this case, and which may be referred to. In that decision I admitted said plan in evidence. It is referred to in said decision as 'the Fuller plan.' That expression, however, was intended to identify the paper, and not as a find-

* By *Davis*, J.

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ing that it was drawn by said Fuller. I found the paper to be an ancient plan, produced from proper custody, purporting to be either a plan or office copy of a plan by one Fuller, a well known surveyor of the day, being in itself a substantially accurate and proportionately drawn representation, as of 1850, of the land now in controversy, and used by or on behalf of Dalrymple,* although not in any transaction to which the respondent, or predecessors of his in title was a party, as showing the land then claimed by him but without the signature of any maker, or any evidence to show whether it was an original sketch or a copy. Nothing further appeared in regard to said plan than as above stated."

We understand that the finding that the plan "used by or on behalf of Dalrymple, although not in any transaction to which the respondent, or predecessors of his in title was a party, as showing the land then claimed by him," to be a finding that in some transaction to which Dalrymple was a party, or in which he was interested, this plan was used as showing the land then claimed by him. It is not a case where the plan simply has been kept undisclosed, but where it has been produced and used in connection with some transaction.

Under these findings the plan was properly admitted. For the general principles bearing upon this branch of the law see *Drury* v. *Midland Railroad*, 127 Mass. 571, 581, and especially *Whitman* v. *Shaw*, 166 Mass. 451, and cases therein cited. The case is not like *Boston Water Power Co.* v. *Hanlon*, 132 Mass. 483, cited by the respondent.

By the terms of the report there is to be a decree for the petitioners; and it is

So ordered.

A. H. Wellman, for the respondent.
E. C. Jenney, for the petitioners.

* Dalrymple was a predecessor in title of the petitioners.

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ADAM DICKEY vs. ARTHUR WILLIS & another.

Suffolk. March 11, 1913. — June 18, 1913.

Present: RUGG, C. J., HAMMOND, LORING, SHELDON, & DE COURCY, JJ.

Practice, Civil, Parties. *Pleading, Civil,* Declaration.

A single action of tort cannot be maintained against two defendants unless they directly or indirectly co-operated in doing the alleged wrong; and a declaration with two counts, each alleging a separate tort committed by a different defendant, with no allegation of conspiracy or concert between them, will be held bad, on demurrer, for misjoinder of defendants.

TORT, with two counts. The first count alleged that the defendant Willis falsely and fraudulently represented that he was the owner of a certain parcel of land in the town of Brookline, that Willis made a contract in writing with certain building contractors, doing business under the name of McFarlan and Company, for the erection of a house on such land, that the plaintiff as a subcontractor, believing that Willis was the owner of the land, furnished certain materials for such house, for which the plaintiff failed to establish a lien by reason of such belief, which caused him to give notice to Willis of his claim of lien instead of giving notice to the true owner, and that the plaintiff, not being paid for the materials by the contractors, who were irresponsible, suffered damage. The second count alleged that the defendant Cunningham was the true owner of the land mentioned in the first count and falsely and fraudulently held out the defendant Willis as the ostensible owner of the house and land, whereby the plaintiff was deprived of his right to establish a lien for the materials furnished by him, because, owing to the deceit of the defendant Cunningham, he had not given notice in writing to him as the true owner of the house and land of the plaintiff's claim of lien as required by law, whereby the plaintiff had suffered loss. There was a further allegation that the two counts were for one and the same cause of action. Writ dated September 19, 1912.

The defendants demurred, assigning, among other grounds of demurrer, that the defendants were joined improperly as joint tortfeasors.

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In the Superior Court *Hardy*, J., overruled the demurrer as to the first count and sustained it as to the second count. Both parties appealed, and at the request of both parties the judge reported the case for determination by this court. If the ruling sustaining the demurrer to the second count was right and a similar ruling should have been made as to the first count, judgment was to be entered finally for both defendants. The other stipulations have become immaterial.

G. W. Reed, for the plaintiff.

H. L. Barrett, for the defendants.

RUGG, C. J. This is an action of tort against two defendants. The declaration contains two counts, one setting forth certain acts performed by one defendant, and the other, acts performed by the other defendant. But there is no allegation of conspiracy or concert between them. There is nothing which fairly can be construed as an averment of joint actions or conduct which would constitute them joint tortfeasors. The acts alleged to have been performed by each defendant are different and they are not alleged to have been part of a common design. Two persons cannot be joined as defendants in an action of tort unless they directly or indirectly co-operate in the doing of the wrong. The allegations do not bring this case within that class of actions. *Feneff* v. *Boston & Maine Railroad*, 196 Mass. 575, and cases cited at 580. *Fletcher* v. *Boston & Maine Railroad*, 187 Mass. 463. There is a misjoinder of defendants. On this ground the demurrer to both counts must be sustained.

It is not necessary to pass on the sufficiency of either count, as if it were against a single defendant, although it may be remarked that there is no averment that the representation contained in the contract between Willis and McFarlan and Company was made to the plaintiff or that he relied upon it.

According to the terms of the report the entry must be

Judgment for the defendants.

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MARTHA J. PARMELEE, administratrix, *vs.* NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

Middlesex. March 13, 1913. — June 18, 1913.

Present: RUGG, C. J., HAMMOND, LORING, SHELDON, & DE COURCY, JJ.

Negligence, Railroad, In freight yard.

In an action by the administrator of a freight brakeman against a railroad corporation for causing the death of the plaintiff's intestate, it appeared that the intestate and a fellow brakeman were charged with the duty of uncoupling two box freight cars from a switching engine and placing each on a different track in the freight yard, that this required one of the brakemen to get on the top of each car when it was switched, that one of the cars was uncoupled and switched successfully, and that the intestate's fellow brakeman was on the top of the remaining car, prepared to brake it when shunted by the engine, a duty which was called "riding the car," that to uncouple the car it was necessary to turn a lever, which could be reached either by standing on the footboard of the engine, a place of safety, or by standing on the lowest round of a ladder attached to the side of the car, that the intestate chose to stand on the ladder of the car, which would have been the proper place for him to stand if it had been necessary for him to "ride" the car, and it did not appear that the intestate knew that his fellow brakeman was on the top of the car, that the intestate while on the ladder was caught between the car he was on and a coal car, which negligently had been left standing on a converging track so near that there was not room for the body of a man between the two cars, and was killed. It did not appear that the intestate had or ought to have had any knowledge of the proximity of the coal car to the track except such as he might have gained from his observation at the time if his attention had not been diverted by the work in hand. *Held*, that the question whether the intestate was in the exercise of due care was for the jury.

It is evidence of negligence on the part of the servants of a railroad corporation, that they left a coal car standing on a track in a freight yard so near a converging track that a brakeman standing on a ladder attached to the side of a car passing on such converging track would be crushed between the cars.

TORT by the administratrix of the estate of Henry Parmelee, a freight brakeman, to recover for his conscious suffering and death on June 8, 1907, when employed in the freight yard of the defendant at Cambridge. Writ dated January 17, 1908.

In the Superior Court the case was tried before *Morton*, J. The facts which could have been found upon the evidence are stated in the opinion. At the close of the evidence the judge

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ordered a verdict for the defendant, and by agreement of the parties reported the case for determination by this court, with the stipulation that, if upon the evidence the jury would have been warranted in finding a verdict for the plaintiff, judgment was to be entered for the plaintiff in the sum of $3,000; otherwise, judgment was to be entered upon the verdict.

G. A. Ham, (*W. F. Frederick* with him,) for the plaintiff.

G. L. Mayberry, (*L. A. Mayberry* with him,) for the defendant.

RUGG, C. J. This is an action to recover for the death of the plaintiff's intestate while in the employ of the defendant as a freight brakeman. Just before the accident, which occurred on the afternoon of a June day, he and a fellow brakeman named Daly were charged with the duty of uncoupling two box freight cars from a switching engine and placing them on different tracks in the Cambridge freight yard. This involved also one brakeman getting on each car when it was switched, and setting the brake at the proper time. One of the cars was switched without incident. A flying switch was to be made of the remaining one. Daly was upon its top prepared to brake it when shunted by the locomotive. This was called "riding the car." It was the work of Parmelee to uncouple this car. He might have done this either by turning a lever while standing on the footboard of the locomotive, a place of safety so far as appears, or by putting his foot on the lower round of the ladder of the freight car and reaching for the lever from this position. Either way would have been proper although done while the locomotive and car were in motion. He was left to do this work in his own way, and chose to stand on the ladder of the freight car. This was on the side and not on the end of the car. While standing thus he was caught between the car he was on and a coal car on the next track, so near that there was not room between the two for his body. If it had been necessary for him to "ride" the car in question, there can be no dispute on this record that it would have been proper for him to stand on the car. Daly was on the car ready to "ride" it, so there was no occasion for Parmelee to go on the car. But there is nothing to show whether Parmelee knew where Daly was. The whole case hardly requires the conclusion as matter of law that he was bound to know that Daly was in position to perform this duty.

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The evidence varied as to the distance between the car on which Parmelee was and the coal car, from six inches to a foot or more. It does not appear that Parmelee had anything to do with placing the coal car or knew or ought to have known from previous observations its proximity to the track on which he was working. The degree of intentness with which he attended to the work in hand would to that extent divert his thought from objects on other tracks. Although the case is close on this point, we think his due care was for the jury.

There was evidence of negligence on the part of the servants of the defendant in leaving the coal car so near to the converging track on which Parmelee was working as to make it dangerous for him to perform his duty. In this respect the case is indistinguishable from *Dacey* v. *Old Colony Railroad*, 153 Mass. 112, and *Mackenzie* v. *New York Central & Hudson River Railroad*, 211 Mass. 586.

In accordance with the terms of the report let the entry be

Judgment for the plaintiff for $3,000.

ALONZO W. PERRY *vs.* ALFRED S. HAYES & others.

Suffolk. March 14, 1913. — June 18, 1913.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DE COURCY, JJ.

Pleading, Civil, Declaration. *Corporation*, Rights of stockholders. *Conspiracy. Res Judicata.*

In an action of tort for a wrongful act alleged to have been committed by joint defendants, an allegation of conspiracy does not change the nature of the wrong alleged, but is simply a way of alleging joint action by the defendants.

An individual stockholder in a corporation cannot maintain an action of tort against other stockholders for illegally voting to issue a large number of new shares of stock in the corporation and transferring such shares without consideration to another defendant, thereby diminishing the value of the plaintiff's shares. The remedy for an illegal issue of stock must be enforced by the corporation or by a suit in equity for the benefit of stockholders to compel such enforcement by the corporation.

An action of tort against three persons for an alleged wrongful removal of the plaintiff from the offices of director and treasurer of a certain corporation was barred

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as to two of the defendants by a decree of the Supreme Judicial Court dismissing a bill in equity by the plaintiff against those defendants and was barred as to the third defendant by a final decree of the Supreme Court of Nova Scotia.

HAMMOND, J. The declaration, after setting out that the plaintiff, by virtue of an agreement with the defendants Hayes and Gale, together with one Daggett and one Pye, became the holder of the greater part of the stock of the Canada-Atlantic and Plant Steamship Company, Limited, which he held subject to an obligation on his part to convey the same to the defendants Hayes, Gale and the said Daggett and Pye, upon their paying certain promissory notes held by him against them amounting in the aggregate to $285,000, avers that Hayes and Gale, knowing that they would be unable to pay at maturity the said notes, "in order to lessen the value of the plaintiff's stock . . . and to enable them to obtain control of the steamship company and thereby to force the . . . plaintiff from his position as director and treasurer of said company which he held through his ownership of substantially all the capital stock of said company, and for the purpose of compelling . . . [the plaintiff] . . . to extend the notes aforesaid or to accept a lesser sum than the principal and interest of said notes, conspired together . . . to cheat and defraud him" by illegally voting to issue four thousand five hundred additional shares of stock; and that the said Hayes and Gale further conspired with the defendant Flanders to convey the same to him for an utterly inadequate consideration, to hold as the agent of Hayes and Gale, and that the stock was illegally issued and the notes never have been paid. The declaration further alleges that by reason of these acts of the defendants the plaintiff "has been injured and has suffered large pecuniary" losses.

The action is for a tort. The allegation of conspiracy does not change in any way the nature of the wrong. It is simply a way of alleging joint action, and if proved, then the act of each conspirator within the scope of the scheme is the act of every other. The gist of the action is the tort and not the conspiracy. *Boston* v. *Simmons*, 150 Mass. 461. *Randall* v. *Hazelton*, 12 Allen, 412.

The things complained of are the illegal issue of stock and the removal of the plaintiff from the offices of director and treasurer of the corporation. So far as respects the illegal issue of stock and the consequent decrease in the value of the plaintiff's stock, the

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right of action is in the corporation and not in the individual stockholders. No stockholder simply as such can maintain either at law or in equity an action against the wrongdoers for his own loss. *Converse* v. *United Shoe Machinery Co.* 185 Mass. 422, and cases cited; and 209 Mass. 539.

So far as the plaintiff has any right to relief as against the defendants Hayes or Gale, either at law or in equity, for any injury for removal from office or for any breach of the contract of June, 1903, named in the declaration, we are of opinion that the matter has been adjudicated by the entry, on May 19, 1905, dismissing the bill brought in the Supreme Judicial Court of this Commonwealth.

It follows that the plaintiff cannot maintain this action against the defendants Hayes and Gale.

As respects Flanders, the other defendant, it is to be noted that he was no party to the contract of June, 1903, named in the declaration, and therefore the plaintiff can have no action against him for breach of that contract.

For reasons above stated the plaintiff cannot maintain an action against Flanders for his participation in the alleged issue of stock, so far as the injury was caused by the decrease in the value of the plaintiff's stock. And the short answer to his whole claim against Flanders is that by the final decree entered in the suit in Nova Scotia,* when considered in the light of the law of that jurisdiction, the whole matter was settled so far as Flanders was concerned.

The result is that the action cannot be maintained. By the terms of the report† the entry should be judgment for the defendants, and it is

So ordered.

The case was submitted on briefs.

W. M. Richardson, for the plaintiff.

D. E. Hall, for the defendant Gale.

C. M. Davenport, administrator of the estate of the defendant Hayes, *pro se.*

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* In the Supreme Court of that Province.

† In the Superior Court the case was heard by *Wait*, J., without a jury. The judge ruled that the plaintiff was entitled to nominal damages, and reported the case for determination by this court.

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WILLIAM WHITE, trustee, *vs.* GRACE K. UNDERWOOD & others.
SAME *vs.* ANNA T. TRIPLER & others.
SAME *vs.* MERCEDES HUBBARD & others.

Suffolk. March 18, 1913. — June 18, 1913.

Present: RUGG, C. J., MORTON, LORING, SHELDON, & DE COURCY, JJ.

Devise and Legacy. Words, "Heirs at law."

A testator by his will created a trust fund, of which the income was to be paid to his children or their issue until the death of an unmarried daughter of the testator, whereupon the following provision was to take effect: "Upon the death of the said [unmarried daughter] whenever it shall take place, this trust shall cease; and my said trustees, and the survivors and survivor of them shall then pay from the said trust-estate, or the proceeds thereof, all debts and demands, if any, which shall exist upon or against the same, and distribute all the remainder thereof among my heirs at law, according to the statutes which shall then be in force in said Commonwealth regulating the distribution of intestate estates." *Held,* that by the words "heirs at law" the testator designated those persons, not expressly excluded, who would have been his heirs at law if he had died at the time of the death of his unmarried daughter.

A testator by his will left a trust fund to be distributed upon the death of an unmarried daughter among those persons who would have been his heirs at law had he died at the time of the death of such daughter. By a codicil he directed that neither the wife nor issue of a certain son should have any part of his property or estate and that the distribution of the trust fund should be made among his "heirs at law, other than the wife and issue of" the son designated. At the time of the making of the codicil the designated son had been divorced from a wife by whom he had children, and after the death of the testator this son married a second wife by whom he had children. At the time of the death of the unmarried daughter of the testator, the designated son of the testator had died and his second wife and all his children were living. *Held,* that by the terms of the codicil the later wife and children of the designated son as well as the children of his first wife were excluded from the distribution.

DE COURCY, J. This is a bill for instructions by the sole trustee under the will of John C. Hubbard, brought upon the decease of Anna M. Hubbard, a daughter of the testator, for the determination of the persons entitled to the remainder over of the trust estate, and the proportions to which those persons are entitled.

By the seventh clause of his will, after making certain provisions for the payment to his children or their issue of the income of the trust estate, the testator provided as follows: "Upon the

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death of the said Anna M. Hubbard, whenever it shall take place, this trust shall cease; and my said trustees, and the survivors and survivor of them shall then pay from the said trust-estate, or the proceeds thereof, all debts and demands, if any, which shall exist upon or against the same, and distribute all the remainder thereof among my heirs at law, according to the statutes which shall then be in force in said Commonwealth regulating the distribution of intestate estates." The main question presented is whether the "heirs at law" of the testator to whom the remainder is given, are to be determined as of the date of his death or as of the time for distribution.

Admittedly the general rule of construction is that where there is a limitation over to a class designated as the testator's heirs at law, the persons who take are those that answer the description at the time of the testator's death, unless a different intention is manifested by the will. Various reasons have been given for this rule, such as the leaning of the law towards vested rather than contingent remainders, and, more recently, the fact that heirs at law by the very meaning of the words are usually those persons who inherit real property immediately on the death of the owner if he dies intestate. *Wood* v. *Bullard*, 151 Mass. 324. *Heard* v. *Read*, 169 Mass. 216. Whatever its basis it must not predominate to defeat what appears from the whole will to have been intended by the testator. As was said by Hammond, J., in *McCurdy* v. *McCallum*, 186 Mass. 464, 469, "The cardinal rule in the interpretation of wills, to which all other rules must bend, is that the intention of the testator shall prevail, provided that it is consistent with the rules of law." And to ascertain that intention it is necessary to consider the particular language of each will, and its general purpose, in the light of the circumstances known to the testator.

It seems to us that the obvious meaning of the language used in this will shows it to be the intention of the testator that the remainder should go to those who would be his heirs at law at the death of his daughter Anna, and not to those who were his heirs at the date of his own death. The date of her death as indicating the time of vesting the remainder is emphasized: "whenever it shall take place," the trust is to cease, and the property is to be distributed "then." *Harding* v. *Harding*, 174 Mass. 268. By

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the express words of the clause in question the distribution is to be made according to the statutes "which shall then be in force." He well may have anticipated, what has proved to be the case, that the persons who would share in the distribution, and the proportion they would take under the statutes that would be in force at the termination of the trust would be different from those who would take under the statutes existing at the time of his own death. It is unreasonable to assume that he intended to have the persons in whom the remainder vested ascertained under the law existing at one time and to have the manner and proportion of the distribution among those persons determined at another time by a different statute.

This view, that the testator intended the remainder to vest in those persons, not expressly excluded, who would have been his heirs at law if he had died on the date of the death of Anna M. Hubbard, is confirmed by other considerations, some of which may be mentioned. It is significant that there are no words of present gift to the heirs, but the distribution is made by way of a direction to the trustees "to distribute all the remainder." *Crapo* v. *Price*, 190 Mass. 317, 322. More conclusive is the fact that the testator by implication excludes the heirs and devisees of his daughter Anna from taking any interest in the remainder after her life estate. For it seems clear to us that the testator intended to exclude them. Anna M. was a single woman and forty-nine years of age when her father died. He undoubtedly anticipated that she would die unmarried or without children. Special provision was made for her support during her lifetime, and at her death the trust was to terminate. In this connection we may point out that if the will were construed as vesting the remainder in those who were the heirs at the time of the testator's death, the decease of Gorham* during the life tenancy might result

* By a codicil the testator provided that neither the wife nor issue of his son Gorham E. Hubbard should have any part of his property or estate, and directed that in the first distribution of his estate under the seventh article of his will his trustees should make such distribution among his "heirs at law, other than the wife and issue of the said Gorham E." The testator died on January 7, 1877. Anna M. Hubbard died unmarried on April 9, 1911. Gorham E. Hubbard died on September 29, 1892. The will of John C. Hubbard was dated October 27, 1873. The codicil to his

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in his wife and children taking, through Anna, a part of the remainder; and this the codicil expressly forbids. *Heard* v. *Read*, 169 Mass. 216. *Fargo* v. *Miller*, 150 Mass. 225.

As to the wife and issue of Gorham E. Hubbard, it seems clear from the explicit terms of the codicil that even the later wife and issue are excluded. It follows that the decree of the Probate Court must be reversed. We are of opinion that the true construction of the will is that the ultimate remainder of the estate is to be distributed among those who would have been the heirs of John C. Hubbard had he died on April 9, 1911, when his daughter Anna M. died, excepting those who would claim through his son Gorham E. Hubbard, and that the distribution is to be *per capita* among those of equal degree of relationship. In other words one fifth goes to each of his living grandchildren, Anna T. Tripler, Grace K. Underwood, Frank P. Kennard, and Arthur W. Kennard, and the remaining one fifth is to be divided among the heirs of his deceased grandson William P. Kennard. R. L. c. 133, § 1. *Peck* v. *Carlton*, 154 Mass. 231. *Welch* v. *Brimmer*, 169 Mass. 204. *Heard* v. *Read*, 169 Mass. 216. *Crapo* v. *Price*, 190 Mass. 317. *Brown* v. *Wright*, 194 Mass. 540. *Boston Safe Deposit & Trust Co.* v. *Blanchard*, 196 Mass. 35. *Sias* v. *Chase*, 207 Mass. 372.

Decree accordingly.

A. H. Weed, for the plaintiff, stated the case.

J. H. Sherburne, (*F. G. Goodale* with him,) for Grace K. Underwood and others.

R. H. Gardiner, Jr., for Grace K. Underwood as executrix of and devisee under the will of Anna M. Hubbard.

F. A. Fernald, for Anna T. Tripler and for Priscilla S. Hubbard individually and as executrix of the will of John Capen Hubbard.

A. M. Lyon, for Mercedes Hubbard and others.

H. S. Allen, guardian *ad litem* for two grandchildren of Gorham E. Hubbard, submitted their case without a brief.

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will was dated December 25, 1875. At or about the date of the codicil Gorham E. Hubbard was divorced from a wife by whom he had four children. On February 4, 1877, after the death of the testator, he married a second wife by whom he had four children. The second wife and all of the eight children survived him and were living at the time of the death of Anna M. Hubbard.

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CHARLES J. WIER & another *vs.* AMERICAN LOCOMOTIVE COMPANY & others.

Suffolk. March 20, 21, 1913. — June 18, 1913.

Present: RUGG, C. J., MORTON, LORING, SHELDON, & DE COURCY, JJ.

Contract, Construction. *Equity Pleading and Practice*, Findings of trial judge. *Damages*, In contract. *Automobile*. *Equity Jurisdiction*, Waiver, Laches, Damages. *Words*, "Automobiles."

In a suit in equity by an automobile dealer against an automobile manufacturer, founded on the alleged breach of a contract in writing, by which the defendant gave the plaintiff the exclusive right to sell the defendant's automobiles in certain counties of the Commonwealth and the defendant agreed not to sell automobiles within that territory except to the plaintiff, the breach of contract relied upon by the plaintiff was the sale by the defendant to a third person of certain taxicabs in the designated territory within the period of the contract, and the defendant contended that these sales were not in violation of the contract because it was not intended by the parties that the word "automobiles" as used in the contract should include taxicabs. It appeared that before the contract was made the defendant never had manufactured taxicabs commercially, but that about the time of the making of the contract the defendant was considering plans and making experiments with a view to the manufacture and sale of taxicabs, and that while the contract was in force the defendant by a special arrangement sold six taxicabs on which it paid the plaintiff a commission. On all the evidence presented, the trial judge, after stating that the question was a close one, found as a fact that the word "automobiles" as used in the contract included taxicabs and was so understood and intended by the parties. *Held*, that this finding of the judge, who saw and heard the witnesses, was not plainly wrong and must stand.

In the same suit in equity the trial judge found, in regard to the defenses of waiver and laches, that, although it was contemplated by the parties that taxicabs were included in the word "automobiles," the defendant's manager did not expect to be called upon to pay commissions on sales of taxicabs, believing that, on account of the cordial and friendly relations that existed between himself and the manager of the plaintiff, the plaintiff's manager would be induced to waive the plaintiff's right to commissions on such sales, and, on conflicting evidence, found that, although the plaintiff had made no attempt to collect commissions on sales of taxicabs by the defendant before the bringing of the suit, yet neither the plaintiff nor its officers or agents ever had waived its right to such commissions. He also found, in view of the friendly relations of the parties and all the evidence in the case, that the plaintiff was not guilty of laches in the enforcement of its claim against the defendant. *Held*, that it could not be said that these findings were plainly wrong.

In a suit in equity by an automobile dealer against an automobile manufacturer founded on the breach of a contract in writing, whereby the defendant made

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the plaintiff the exclusive agent for the sale of its automobiles within a certain territory and agreed not to sell its automobiles within that territory except to the plaintiff, it appeared that the defendant committed breaches of the contract by selling to outside persons a certain number of taxicabs within the designated territory while the contract was in force, and that the plaintiff was entitled to recover from the defendant a commission on such sales. The list price of these taxicabs as fixed by the contract between the plaintiff and the defendant was $3,350 each, and the plaintiff was entitled to receive a commission of twenty per cent on the list price on all sales made by it. The defendant had sold the taxicabs in question for $2,600 each. The customers to whom they were sold were introduced by the plaintiff. *Held*, that the defendant was precluded from raising the question whether the plaintiff could have made the sales of the taxicabs if the defendant had not made them, that the defendant had no right as against the plaintiff to sell its automobiles in the designated territory below the list price to which the plaintiff was bound, and that the plaintiff was entitled to recover its usual commission of twenty per cent upon the list price of the taxicabs sold by the defendant, diminished by the amount of the expense which the plaintiff would have incurred if it had made the sales.

DE COURCY, J. It is not now in dispute that the real parties in this case are the Park Square Automobile Station, a Maine corporation herein referred to as the plaintiff, and the American Locomotive Company, a New York corporation hereinafter referred to as the defendant. The question involved in the trial was whether the plaintiff is entitled to damages, and if so how much, on account of an alleged breach of a certain contract, whereby the plaintiff was given the exclusive right of sale of the defendant's automobiles in certain counties of Massachusetts for a given period, and the defendant agreed not to sell such automobiles within that territory except to the plaintiff. The contract was executed on January 1, 1908, between the plaintiff and the American Locomotive Automobile Company, which later was merged in the defendant company, and the defendant recognizes the contract as binding upon it. The breach complained of is the alleged sale in Boston by the defendant itself of fifty taxicabs to the Taxi-Service Company, and ten to the Armstrong Transfer Company, during the term of the contract.

The trial judge* filed a memorandum of facts found by him, declined to make certain findings and rulings requested by the defendant, and in view of his findings and on all the evidence ruled that the plaintiff was entitled to a decree ordering the de-

* *Crosby*, J. The proceeding was a suit in equity in which the evidence was taken by a commissioner under Equity Rule 35.

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fendant to pay the sum of $39,600 with interest thereon from the date of the filing of the bill. The report of the case to this court states: "The defendant desires to have the full court pass upon its exceptions to my rulings on points of evidence, and also desires to have the full court pass upon all the evidence in the case with a view to determining as to the correctness of my findings and rulings. In order that all these matters may be submitted to the court at one time, I now at the request of the defendant American Locomotive Company and with the consent of the parties, report the case and the questions of fact and law arising therein, it being intended hereby to present to the court all the questions that would be raised by a bill of exceptions and by an appeal after decree."

The only exceptions as to evidence now insisted upon by the defendant relate to the exclusion of a question to the witness Best, and the offer of proof made in connection therewith. These affect only the question of damages and admittedly are immaterial if the rule of damages adopted by the judge was correct. In view of our decision on that issue later, the exceptions as such need not be considered further.

On the merits of the case, the first contention of the defendant is that it was not intended by the parties that the word "automobiles" in said agreement should include taxicabs. There is strong support of this view in the evidence. Neither the defendant nor the American Locomotive Automobile Company had manufactured taxicabs commercially before the time when this contract was made. The conduct of the plaintiff's manager, Christopher F. Whitney, at the time of these sales, and his failure to assert a claim at an earlier date than he did, especially in view of the financial difficulties of the plaintiff and its indebtedness to the defendant, tend to show that he construed the contract as not covering these sales of taxicabs. On all the evidence the trial judge regarded this question as a close one and so stated.

The judge found as a fact, however, that "the word 'automobiles' as used in the agreement of January 1, 1908, includes taxicabs and was so understood and intended by the parties thereto." And his memorandum proceeds as follows:

"5. The evidence shows that the American Locomotive Au-

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tomobile Company had not manufactured or sold taxicabs prior to the date of its contract with the plaintiff company, but that about the time said contract was entered into plans were under consideration and experiments made with a view to such manufacture and sale. During the year 1908, while said contract was in force, six taxicabs were sold to one Cummings about which a special arrangement was made and under which arrangement the plaintiff company was paid a commission of $100 on each taxicab so sold. I further find that while said agreement of January 1, 1908, was in force the American Locomotive Automobile Company sold and delivered in Boston fifty taxicabs to the Taxi-Service Company for $2,600 each, and ten taxicabs to the Armstrong Transfer Company for $2,600 each. I find that the list price of said taxicabs according to the price list furnished and promulgated by the American Locomotive Automobile Company was $3,350 each.

"6. I find that it was within the contemplation of the parties when the agreement of January 1, 1908, was entered into that taxicabs were included in the word 'automobiles,' although at the date of said contract no taxicabs had been manufactured by the American Locomotive Automobile Company. I find that Whitney, the manager of the Park Square Auto Station, began the negotiations with the representative of the Taxi-Service Company for the sale of taxicabs and took him to the defendants' factory in Providence, Rhode Island, and there conferred with the representatives and officers of the defendant company; that afterwards and during the term of the agreement of January 1, 1908, and while it was in force, said fifty taxicabs were sold by the American Locomotive Automobile Company to the Taxi-Service Company. I further find that Whitney, as manager of the plaintiff company, since said sales of said taxicabs to the Taxi-Service Company and to the Armstrong Transfer Company has repeatedly made requests to manager Joyce of the defendant company for payment of the commissions upon said sales, but that said Joyce never promised Whitney to pay the same or admitted to Whitney that such commissions were due or payable, and none of said commissions have ever been paid. I further find that after January 1, 1908, and while the contract of that date was in force, the defendant company sent out notices to agents who had contracts

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with it similar to that which it had with the plaintiff company, stating in substance that no commissions would be allowed in the sale of taxicabs. I find, however, that no such notice was received by the plaintiff company, and that its officers or agents did not have knowledge of said notice."

By the long established rule these findings of fact made by the trial judge who saw and heard the witnesses must stand unless they are plainly wrong. *Dickinson* v. *Todd*, 172 Mass. 183. *Adams* v. *Protective Union Co.* 210 Mass. 172. And after an examination of the voluminous record, giving due weight to the great advantage possessed by the judge for forming opinions as to the credibility of witnesses and discovering the truth, we cannot say that he was clearly wrong. In the first place the words of the written contract, if doubtful, will be most strongly construed against the defendant, which prepared it under the direction of its general counsel. 9 Cyc. 590, and cases cited. The word "automobiles" ordinarily includes taxicabs; and when the defendant clearly intended to except them it expressly said so, as in the agreement with the plaintiff for 1910. Although the American Locomotive Automobile Company had not manufactured and sold taxicabs before the date of this contract, January 1, 1908, there was evidence that it then had plans under consideration and had made experiments with a view to such business; that in the fall of 1907 Whitney rode in one at the defendant's factory; that then or early in 1908 it had put into the hands of the Westcott Express Company in New York two cabs to test out; that a sale of cabs was made to the Seaich Company in February, 1908, and to one Cummings in the fall of that year. It further appeared that it was experimenting on taxicabs in 1907, some months before perfecting them; and that these cabs did not differ, except in a few particulars, from the town cars which had been manufactured and sold by it for some years previous to January, 1908. In view of these facts and other evidence in support of the plaintiff's contention on this issue, notwithstanding the evidence of the defendant to the contrary, we cannot say that the judge was plainly wrong in finding that the parties did intend to include taxicabs in the agreement.

The defendant next contends that the plaintiff is precluded from maintaining this action by the agreement of September 1,

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1910, operating as an estoppel or amounting to an account stated. *Rand* v. *Wright*, 129 Mass. 50. It sought to get the benefit of these two defenses by the following requests for rulings: "4. If the officers of the Park Square Automobile Station, with knowledge of the fact that various taxicabs had been sold in the summer and fall of 1908, agreed on September 1, 1910, that the claim of the American Locomotive Company against the Park Square Automobile Station amounted to a certain figure and that the assets of said auto station included no claim against the American Locomotive Company, the plaintiff is not now entitled to recover. 5. If the American Locomotive Company executed the agreement of September 1, 1910, in reliance upon the fact that the statement of its accounts with the Park Square Automobile Station showed a large balance in its favor and that there was no such claim against it as is now asserted, the Park Square Automobile Station is estopped from now asserting the claim." In the memorandum the judge states, "The fourth request is refused because I find that Whitney as manager of the plaintiff company frequently requested of Joyce, the manager of the defendant company, payment of commissions on taxicabs so sold in 1908 while the contract of January 1, 1908, was in force, and that the manager of the defendant company had no reason to believe that said commissions had ever been waived or abandoned. The fifth request is refused because I find that the manager of the defendant company had knowledge (notwithstanding the statement of accounts between the plaintiff and the defendant company annexed to the agreement of September 1, 1910) of the claim of the plaintiff company for commissions on taxicabs, which claims the defendant company, acting by its manager, had no reason to believe had ever been waived or abandoned." These findings of fact are decisive against the defendant's contention, unless they are plainly wrong; and we cannot say that they are, as the findings are warranted by the testimony, especially that of Whitney, if believed.

In this connection it is important to consider the third finding of the judge: "I find that the Park Square Auto Station was not a party to the agreement dated September 1, 1910, and that the claims sought to be recovered in this suit were not assigned by virtue of said agreement and that the Park Square Auto Station

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never had ratified or adopted said agreement." That instrument was executed only by the Dayton Motor Car Company and the Courier Car Company, called the Ohio companies, and the American Locomotive Company. At that time the Ohio companies had become the owners of all the shares of the plaintiff Park Square Auto Station, and it does not appear that they had any knowledge of the taxicab transactions that might bind the corporation. The instrument itself does not purport to be an account stated, and while it fixes definitely the liabilities of the plaintiff it contains no statement of the amount or character of its assets.

As to the defenses of waiver and laches the judge made the following findings: "7. I believe that while it was contemplated by the parties that taxicabs were included in the word 'automobiles,' the manager of the defendant company did not expect to be called upon to pay said commissions; but believed in view of the cordial and friendly relations which existed between himself and Whitney, the manager of the plaintiff company, that the latter would be induced to waive said commissions and not insist upon the same. . . . 9. While the evidence is conflicting and the question is not free from difficulty, I find that neither the Park Square Auto Station nor its agents or officers ever waived its right to such commissions, or expressly or impliedly agreed to waive the right to receive said commissions, although no attempt was made to collect the same before the bringing of this suit. 10. In view of the friendly relations of the parties and all the evidence in the case I find that the plaintiff company has not been guilty of laches in the enforcement of its claim against the defendant company." We cannot say that these are wrong. They are supported by the testimony of Whitney as to his talks with Vandyke, who was the defendant's assistant sales manager, with Hobby, its assistant treasurer, and especially with Joyce, the defendant's manager; and by that of the plaintiff's bookkeeper, Miss Stearns. It would serve no useful purpose to cite this testimony at length.

It remains to consider the question of damages. The sales in question were made in violation of the contract between the parties, which not only made the plaintiff exclusive agent for the territory where they were made, but by its express provisions

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prohibited the defendant from selling its automobiles within that territory. *Garfield* v. *Peerless Motor Car Co.* 189 Mass. 395. The defendant in fact has made these sales, and is now precluded from raising the question whether the plaintiff, who introduced both of these customers, could have made the sales to them if the defendant had not done so. As between the plaintiff and the defendant the price of the cabs was expressly fixed at $3,350 each, except when some special arrangement was agreed upon, as was done when six taxicabs were sold to Cummings; and the defendant could not lawfully as against the plaintiff sell below that list price and thereby destroy the plaintiff's market. As the defendant saw fit to make these prohibited sales at a reduced price on its own responsibility, it must do so at its own expense, and cannot arbitrarily impose the consequences upon the plaintiff. It fairly could be inferred that the parties contemplated, as the measure of damages for a breach caused by the defendant's wrongful sale in the plaintiff's exclusive territory, the amount that the plaintiff would receive if the sale had been made by it. This standard was fixed by the contract itself, as a commission or discount of twenty per cent of the list price. *Marshall* v. *Canadian Cordage & Manuf. Co.* 160 Ill. App. 114. *Sparks* v. *Reliable Dayton Motor Car Co.* 85 Kans. 29. It was also recognized by the defendant in its dealings, according to some of the evidence in the case. It appears that when it sold an automobile in the plaintiff's territory it paid to the plaintiff a commission of twenty per cent on the list price. And as to taxicabs, the defendant's manager Joyce testified that when one was sold to an individual customer at the list price the agent would get the commission even under the later agency contracts that excluded commercial cabs. We cannot say, then, that the judge was wrong in adopting as the measure of the plaintiff's damages the usual commission on the list price of the taxicabs that were sold by the defendant, in violation of the contract.

As to the number of taxicabs so sold, there seems to be no dispute that ten were bought by the Armstrong Transfer Company in September, 1908. We find no evidence, however, that warrants a finding of the sale of more than forty-one cabs to the Taxi-Service Company during the period covered by the plaintiff's 1908 contract. The agreement of that company, dated August

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11, 1908,* did not constitute a sale of taxicabs and did not oblige it to buy any. The fact that the plaintiff's manager was instrumental in bringing the parties together, and that the Taxi-Service Company bought many cabs from the defendant after the expiration of the plaintiff's contract, cannot avail the plaintiff in this proceeding. Consequently the plaintiff is entitled to twenty per cent on the price list ($3,350) of fifty-one taxicabs, less the sum of $10 on each one, which is the expense the plaintiff would have incurred if it had made the sales; and a decree is to be entered accordingly.

So ordered.

R. G. Dodge, (*F. W. Johnson* with him,) for the defendant American Locomotive Company.

E. C. Stone, (*G. F. Grimes* with him,) for the plaintiffs.

OTTO W. KAATZ *vs.* PHILIP J. CURTIS & another.

Essex. March 24, 1913. — June 18, 1913.

Present: RUGG, C. J., MORTON, LORING, SHELDON, & DE COURCY, JJ.

Equity Pleading and Practice, Appeal. *Deed. Devise and Legacy. Way*, Private.

On an appeal from a final decree in a suit in equity, where the only question before this court is whether the decree is within the scope of the bill and is supported by the facts found by the master, a statement of facts agreed upon by the counsel in the case can be considered only so far as it appears to embody the evidence that was before the judge who made the decree appealed from.

In a suit in equity to establish a certain private way as designated upon a certain plan recorded in the registry of deeds, it appeared that the previous owner of the land of both the plaintiff and the defendant died, leaving a will by which he devised to the defendant the defendant's lot of land, bounding it upon the private way as shown on the plan in question, which was referred to by name and date and by the volume and page of its recording in the registry of deeds, and that the executor of the will of such common owner of the land under a license from the Probate Court conveyed to the plaintiff the plaintiff's lot of land, bounding it on the same private way as shown on the same plan referred to in the same manner. The private way as designated on the plan passed over land occupied in part by barns of the defendant. *Held*, that the plan referred to in the devise to the defendant and in the deed to the plaintiff was incorporated in each as a

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* This was a lease of certain taxicabs to the Taxi-Service Company for three months with an option to purchase the taxicabs at a certain price at any time during the term of the lease.

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part of the devise and conveyance so far as applicable thereto, and that the defendant as against the plaintiff was bound by the location of the way thus defined.

One who has a right of way over a private street adjoining his land has a right to the use of the surface for the usual purposes of such a way and a right to enter upon it and prepare it for that use.

BILL IN EQUITY, filed in the Superior Court on December 5, 1911, by the owner of certain real estate in Lawrence, adjoining an alleged private way called John Street, against the owner and the husband of the owner of a lot of land also adjoining such private way, praying that John Street as shown on the plan mentioned in the opinion might be established as a private way, and that the defendants might be enjoined from interfering with the grading and levelling and the free use of John Street by the plaintiff.

The case was referred to Frederic N. Chandler, Esquire, as master. He found that the whole question at issue between the parties was in regard to the correct location of the street called John Street, which never had been accepted by the city of Lawrence or laid out by any proper authority as a public street or way; "that the location of John Street as at present used entirely clears the barns upon the land occupied by the defendants, which land and buildings were devised to Christine Hanson, now the wife of defendant Philip J. Curtis, and that John Street as it runs now and as it is asserted by the defendants it ought to run, runs across a portion of the land conveyed to the plaintiff by the deed [mentioned in the opinion], and as the location of John Street as shown on the plan recorded in said book 244, is impassable by reason of the knoll and buildings of the defendants above referred to, a certain amount of travel crosses the plaintiff's said land as described in said deed. . . . And I find that such travel has not however, from the evidence, ripened into a right of way or easement in favor of any particular person or persons, but there is evidence to show that John Street as at present located has been used by pedestrains and vehicles for a space of twenty years or more."

The findings of the master in regard to the lots of land of the plaintiff and of the defendant Christine Curtis and the descriptions of those lots respectively in the deed to the plaintiff and the devise to that defendant, each with a reference to the plan of

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"Lots at Cottage Park belonging to John Colby," recorded in the registry of deeds for the North District of Essex in book 244, page 600, are stated in the opinion.

The case was heard by *Hardy*, J. He made a final decree that the exceptions of the plaintiff and of the defendants to the master's report be overruled; that the master's report be confirmed; that John Street "as shown on a plan of lots at Cottage Park, belonging to John Colby, recorded April 18, 1907, with North District of Essex Deeds, book 244, page 600, be and hereby is established as a private way;" that the defendants are enjoined from in any way obstructing or interfering with the plaintiff's free use of John Street as thus established, and from interfering with or obstructing the plaintiff or his agents and servants in opening, grading, or in any way making passable for vehicles said John Street as shown aforesaid, or enclosing with a proper fence or wall the lots of land numbered 150 and 161 on said plan of lots recorded as aforesaid; that the defendants are ordered to remove from the limits of the way thus established any buildings that they are now maintaining thereon within a period of sixty days from the entry of this decree; and that the plaintiff recover of the defendants his costs, to be taxed as in actions at common law, and that execution issue therefor. The defendants appealed from the decree.

W. S. Knox, for the defendants.

I. W. Sargent, for the plaintiff, was not called upon.

DE COURCY, J. The only question before us on this appeal from the final decree is whether the decree is within the scope of the bill and is supported by the facts found by the master. *E. W. Burt & Co.* v. *Coes & Young Co.* 212 Mass. 134. The record is not clear. The testimony of certain witnesses, referred to in the master's report as being annexed thereto, is not in fact printed; and the same is true of some of the exhibits in the case. We can consider the printed statement of facts agreed upon by counsel only so far as it appears to embody the evidence that was before the judge whose decree is appealed from. *Robinson* v. *Brown*, 182 Mass. 266. There were objections to the master's report, but so far as appears in the record no exceptions were filed.

The master finds the following facts: One John Colby was the owner of a large tract of land in Lawrence and attempted to dispose of it in small parcels or building lots. At different times he

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made plans of all and of portions of the tract, and recorded some of them. Colby died on October 22, 1908. By his last will he devised to Christine Hanson (now Christine Curtis, and herein called the defendant), "two lots of land with buildings thereon situated at the corner of Ferry and East Pleasant Street also bounded on John Street, said lots being lots 'A' and 'B' on a plan of 'Lots at Cottage Park belonging to John Colby,' dated April, 1903, and recorded in the Registry of Deeds for the Northern District of Essex, Book 244, Page 600." The executor of Colby's will, under a license obtained from the Probate Court, by deed dated January 3, 1911, conveyed to the plaintiff "lots 150 and 161 on 'Plan of Lots at Cottage Park belonging to John Colby' which said plan being [*sic*] recorded in the Registry of Deeds for the North District of Essex, book 244, page 600. Lots 150 and 161 are bounded and described as follows: southerly by John Street one hundred sixty (160) feet; westerly by East Pleasant Street forty (40) feet; northerly by land of parties unknown one hundred sixty (160) feet; and easterly by Midland Street forty (40) feet." The master's report specifically states: "I find that both the plaintiff and the defendants took title according to the description contained in the plan recorded in book 244."

By a well settled rule of construction the plan referred to became incorporated in the deed to the plaintiff and in the devise to the defendant; and the particulars appearing thereon and applicable to these lots are to be regarded as if fully set forth in the instruments under which they respectively derive title. As between these parties the location and dimensions of the private way designated John Street is fixed by the plan. Each owns the soil thereof opposite his land to the centre of the way, with a right of way over the other half. *Morgan* v. *Moore*, 3 Gray, 319. *Farnsworth* v. *Taylor*, 9 Gray, 162. *Boston Water Power Co.* v. *Boston*, 127 Mass. 374. *McKenzie* v. *Gleason*, 184 Mass. 452. *New England Structural Co.* v. *Everett Distilling Co.* 189 Mass. 145. *Gould* v. *Wagner*, 196 Mass. 270. *Downey* v. *H. P. Hood & Sons*, 203 Mass. 4. As Colby, the owner of the entire tract, saw fit to define John Street on this plan as running through land occupied in part by his barns, the defendant who succeeds to his title is estopped, as against this plaintiff, from denying the location of the way so established.

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The defendant's contention that the street as now used, encroaching upon the land of the plaintiff, has been substituted as a public way by prescription for the private way defined by the plan, is disposed of by the finding of the master that the travel thereon has not ripened into a right of way or easement. In the absence of the evidence we cannot say that this finding is wrong. As John Street is not a public but merely a private way, the plaintiff has a right to the use of the surface for the usual purposes of such a way and a right to enter upon and prepare it for that use. See *Atkins* v. *Bordman*, 2 Met. 457, 467.

Decree affirmed.

ELECTRIC WELDING COMPANY, Limited, *vs.* FRANK E. FITZ & others.

SAME *vs.* NATHANIEL S. SIMPKINS & others.

Suffolk. Barnstable. March 24, 1913. — June 18, 1913.

Present: RUGG, C. J., MORTON, LORING, SHELDON, & DE COURCY, JJ.

Limitations, Statute of. Executor and Administrator. Corporation, Foreign, Liability of stockholder.

In a suit in equity by a foreign corporation under R. L. c. 141, §§ 26, 27, against the devisees and legatees under the will of a deceased subscriber for shares of stock of the plaintiff, for the collection of a call of £1 a share, it appeared that the call upon the subscribers had not been made by the plaintiff's directors until after the settlement of the estate of the deceased subscriber and after the expiration of the two years period of limitation, but that, before the expiration of such period of limitation and before the estate was fully administered, the public subscription for the stock of the plaintiff had failed and the necessity for and probability of a call upon the actual subscribers must have been apparent to the plaintiff's directors, and that at that time the maximum remaining liability of the deceased subscriber was £4 a share. *Held*, that under R. L. c. 141, § 13, the plaintiff's claim could legally have been presented to the Probate Court before the estate was fully administered as one that might become justly due from the estate, for the satisfaction of which the executor might have been ordered to retain in his hands sufficient assets, and that therefore the defendants could not be made liable for the claim under §§ 26, 27.

TWO BILLS IN EQUITY, filed in the Supreme Judicial Court on February 9, 1912, by a corporation organized under the laws

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of the United Kingdom of Great Britain and Ireland, to enforce the alleged liability under R. L. c. 141, §§ 26, 27, of the respective devisees and legatees under the wills of two deceased subscribers for shares of the capital stock of the plaintiff, for a payment of £1 a share in accordance with a call made by the plaintiff's directors.

The defendants in each case demurred to the bill. The cases were heard by *Morton*, J., who sustained the demurrers, and made final decrees dismissing the bills. The plaintiff appealed. The material facts as alleged in the bills are stated in the opinion.

A. L. Fish, for the plaintiff.

E. H. Talbot, (*H. C. McKenna* with him,) for the defendants Frank E. and Fanny Slade Fitz.

A. M. Chandler, for the defendants Charles S. Dana and Emma Jenny Fitz.

G. S. Selfridge, for the defendants Nathaniel Stone Simpkins and others.

R. Spring, for the defendant Blanchard.

W. G. Thompson & R. Spring, by permission of the court, submitted a brief on behalf of Royal Robbins and others.

RUGG, C. J. The plaintiff, an English corporation, seeks to recover a call for a payment of £1 per share upon stock subscribed for by Eustace C. Fitz and John Simpkins respectively, both now deceased, in these suits against their devisees and legatees. Their estates were settled in probate courts in this Commonwealth before the call for payment upon the stock was made. The point to be decided is whether the devisees and legatees of these decedents are liable under R. L. c. 141, §§ 26, 27. The substance of these sections, so far as now material, is that a creditor after the settlement of an estate and whose right of action accrues after the expiration of the special statute of limitations "and whose claim could not legally be presented to the Probate Court," may recover from the legatees or heirs. It is plain upon the allegations of the bills that the rights of action did not accrue until after the settlement of the estates. The vital question is whether the claims legally could have been presented to the Probate Court. The answer depends upon R. L. c. 141, § 13, which provides in such case that a creditor may present his claim at any time before the estate is fully administered to the Probate Court, and if

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that "court finds that such claim is or may become justly due from the estate," it shall order the executor or administrator to retain in his hands sufficient to satisfy the same. The precise point is whether the plaintiff's claim, before these estates were fully administered, properly could have been described as one which "may become justly due."

The liability of the estates of these decedents was not a debt upon which action could be brought until a call was actually made by the directors of the plaintiff company. The shareholders' liability was to pay the balance of the uncalled capital when and not until a call was made. *In re Russian Spratts Patent, Ltd.* [1898] 2 Ch. 149. *Alexander* v. *Automatic Telephone Co.* [1899] 2 Ch. 302. The maximum remaining liability of the decedent subscribers was £4 per share at the time the call for the £1 per share here in suit was made. The statute in question has been before the court for construction and application in several cases. It has been said that the whole "statute must be construed reasonably. It cannot have been intended to enable any one, who has an outstanding contract made by a deceased person, to suspend the settlement of the estate indefinitely, without regard to the probability of anything becoming due upon the contract, and when it still is impossible for the Probate Court to form any estimate of what amount should be retained as 'sufficient to satisfy the same,'" *Bullard* v. *Moor*, 158 Mass. 418, 424; and that "the settlement of the estates of deceased persons should not be unnecessarily delayed." *Forbes* v. *Harrington*, 171 Mass. 386, 391. Yet it also has been said that "the language of the statute plainly implies that there may be at least some uncertainty as to whether or not the debt may be justly due," *Peabody* v. *Allen*, 194 Mass. 345, 347; and that its "legal effect is to hold the executor or administrator answerable for the claim beyond the special statute limitation of two years, and extends the lien upon the real estate of the deceased for the satisfaction of the claim," *Bassett* v. *Drew*, 176 Mass. 141, 145; and that its purpose is not to enable the Probate Court to determine how much is due nor to collect the claim if it is not yet due. *Converse* v. *Nichols*, 202 Mass. 270. In the case at bar the public subscription for stock of the plaintiff had failed, and the necessity for and the probability of a subsequent call or calls was better within

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the knowledge of the plaintiff and its directors than of anybody else. The obligation to pay assessments upon the stock was definite as to the maximum amount, and whether any call should be made and how much it should be depended upon the action of the directors. Whatever uncertainty existed was one over which the plaintiff's directors had control. It is not practicable to attempt to lay down a general rule which shall govern all cases. As applied to the case at bar, the determining factor under the statute is not the uncertain or contingent character of the claim against the estate, but whether its nature is such that the debtor can present to the Probate Court with a reasonable degree of intelligence a statement of a liability having limits as to amount, some foundation in law and a fair basis of fact in its support. The knowledge which directors may be presumed to have of the condition of their company is such that they could have presented to the Probate Court such a statement of the probable necessity of making a call for payment in whole or in part of unpaid subscriptions to stock. The cases from other jurisdictions relied upon by the plaintiff construe statutes materially different from that before us. The language of our statute contemplates some degree of contingency and uncertainty in the character of the claims which may be found likely to be due. This case is not distinguishable in principle from *Converse* v. *Nichols*, 202 Mass. 270.

Decree in each case affirmed with costs.

BESSIE SLOTOFSKI, administratrix, *vs.* BOSTON ELEVATED RAILWAY COMPANY.

SAME *vs.* SAME.

Middlesex. March 25, 1913. — June 18, 1913.

Present: RUGG, C. J., MORTON, LORING, SHELDON, & DE COURCY, JJ.

Practice, Civil, Preliminary inquiry by presiding judge. *Evidence*, Declarations of deceased persons. *Negligence*, Street railway.

Where a declaration of a deceased person is offered in evidence under R. L. c. 175, § 66, the presiding judge, while conducting a preliminary examination for the purpose of determining whether the declaration offered was made by the dec-

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larant under the conditions required by the statute, may direct that the jury be retired out of hearing.

In an action for the suffering and death of the plaintiff's intestate caused by a fall from a street railway car operated by the defendant's servants, where it appears that the intestate by reason of his injuries suffered concussion and contusions of the brain and died within forty-eight hours after the accident, if the plaintiff offers in evidence declarations of the intestate as to the way in which the accident occurred, the presiding judge, in determining the preliminary question whether the statements offered in evidence were made by the declarant in good faith, properly may consider whether the intestate after his injuries was in such a mental state as to be capable of making the alleged statements, and if the judge declines to find that the statements were made at all, on the ground that he does not believe that a man whose brain had received such a concussion could or did make such statements, such preliminary decision is final and the alleged declarations must be excluded.

In an action by an administrator against a corporation operating a street railway for causing the suffering and death of the plaintiff's intestate, if the defendant's evidence is to the effect that the plaintiff's intestate was standing on the rear platform of an open car of the defendant, which was moving at the rate of eight or ten miles an hour on a straight track, when the intestate in some way fell off the car to the left, and that there was no chain in position, and if there is no evidence that the car was equipped with chains or that there was any requirement to use chains, the presiding judge properly may instruct the jury that, if they find upon the weight of the testimony that the plaintiff's intestate fell off the platform while the car was in motion, substantially as testified by the defendant's witnesses, there is no ground for recovery.

TWO ACTIONS OF TORT, by the administratrix of the estate of Joseph Slotofski, respectively for causing the conscious suffering and the death of the plaintiff's intestate on May 23, 1906, when he was a passenger on an open street railway car of the defendant on Faulkner Street in Malden, by reason of the alleged negligence of the defendant and the gross negligence of the defendant's servants. Writ dated December 15, 1906.

In the Superior Court the cases were tried before *Fox*, J. The jury returned a verdict for the defendant in each of the cases; and the plaintiff alleged exceptions, raising the two questions which are stated in the opinion besides others which were not argued.

E. Greenhood, for the plaintiff.

F. W. Fosdick, for the defendant.

DE COURCY, J. The chief injuries received by the deceased were concussion and contusions of the brain, from which he died within forty-eight hours after the accident. He was insensible immediately after his fall and until after treatment by a physician in the drug store to which he was removed, was semi-conscious

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the next day, and finally lapsed once more into insensibility. He was constantly complaining of pain in his head. A witness for the plaintiff who understood the language of the deceased, testified that he thought the man's conversation in the drug store after he regained consciousness was incoherent.

In the absence of the jury a son and a daughter of the deceased testified that certain declarations were made by him, which were in substance that the conductor started the car while he was alighting. The judge excluded this testimony and ruled that under R. L. c. 175, § 66, the court must find that the statements were made by the deceased before he could pass upon the question whether the statements, if made, were made in good faith; and he declined to find that they were made at all, on the ground that he did not believe that a man whose brain had been the recipient of such a concussion could or did make such statements. The plaintiff excepted to the ruling and to this exclusion of evidence.

The competency of witnesses and the admissibility of evidence that is offered is for the judge to determine. When, in order to pass upon the admissibility in law of a given piece of evidence, it becomes necessary to determine a preliminary question of fact, this also the judge necessarily must determine before he admits the evidence to the jury. During this proceeding he may direct that the jury be retired out of hearing, as was done in this case, and may hear evidence on both sides to ascertain the incidental fact. So far as his decision is of a question of fact merely, it is ordinarily conclusive unless it appears that the evidence was not sufficient to warrant the finding on which the court proceeded. *Commonwealth* v. *Robinson*, 146 Mass. 571. *Dexter* v. *Thayer*, 189 Mass. 114. Wigmore on Evidence, § 2550. 8 Ann. Cas. 539, note. The practice in this Commonwealth on certain issues in criminal cases such as confessions and dying declarations is to allow the accused to reargue to the jury the preliminary question of fact where the evidence is let in against his objection. *Commonwealth* v. *Reagan*, 175 Mass. 335. *Commonwealth* v. *Tucker*, 189 Mass. 457. But even in these exceptional cases, if the evidence is excluded, that is an end of the matter unless some question of law is reserved. As was said by Holmes, J., in *Commonwealth* v. *Bishop*, 165 Mass. 148, "the whole purpose of the preliminary action of the judge would be lost if in all cases the

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evidence had to be laid before the jury so as to give them the last word."

Under the statute in question, it is a condition precedent to the admissibility of the declarations of a deceased person that the presiding judge shall determine, as a preliminary finding, that the declaration was made in good faith before the commencement of the action and upon the personal knowledge of the declarant. R. L. c. 175, § 66. *Dickinson* v. *Boston*, 188 Mass. 595, 597. *Glidden* v. *United States Fidelity & Guaranty Co.* 198 Mass. 109. *Carroll* v. *Boston Elevated Railway*, 210 Mass. 500. Where the form of the statement made by the deceased leaves it doubtful whether it was a statement of fact or of opinion, it is for the court to decide in which sense it was made. *Stone* v. *Commonwealth*, 181 Mass. 438. *George* v. *George*, 186 Mass. 75. *Gray* v. *Kelley*, 190 Mass. 184. Where, as in the case at bar, the judge cannot find the existence of the alleged declaration, it is difficult to conceive how he can find good faith and the other requisites plainly required by the statute. And we cannot say that he was not justified by the evidence in coming to the conclusion that the deceased was in such a mental state, in consequence of his injuries, as to be unable to make the alleged statements. The plaintiff's exceptions relating to the preliminary inquiry must be overruled.

The only other exception argued by the plaintiff is that to the following sentence in the judge's charge: "So if you find upon the weight of the testimony in this case that this old gentleman did fall off the platform while the car was in motion, and as in substance as the testimony is on the defendant's side, then there is no ground for a recovery in this case." This exception also must be overruled.

The only evidence set out in the exceptions as introduced on the defendant's side is that the deceased was standing on the rear platform from Sullivan Square to the place of the accident, that the car was going at the rate of seven or eight miles an hour, that the deceased in some way fell off the car to the left, and that there was no chain in position. No breach of duty on the defendant's part appears in this. The evidence does not disclose that the car was equipped with chains or show anything that compelled the defendant to use them. *Byron* v. *Lynn & Boston Railroad*, 177 Mass. 303. *Dolphin* v. *Worcester Consolidated Street Railway*, 189 Mass.

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270. The car was not passing over a curve, as in *Spooner* v. *Old Colony Street Railway*, 190 Mass. 132, nor prematurely started as in *Gordon* v. *West End Street Railway*, 175 Mass. 181, both cited by the plaintiff. The judge had ruled, without objection on the part of the plaintiff, that there was no evidence of any negligence of the defendant with reference to the condition of the track or state of repair of the car, or the unfitness of its servants, or of gross negligence on the part of the motorman. The evidence did not disclose any jolt or lurch, nor a negligent starting or stopping of the car, nor any failure of duty by the conductor. *Olund* v. *Worcester Consolidated Street Railway*, 206 Mass. 544.

Although the exceptions that were not argued may be considered as waived, it may be added that we find no error therein.

Exceptions overruled.

PAUL G. CHRISTIANSEN *vs.* JOSEPH J. LANNIN, trustee.
GEORGE U. CHRISTIANSEN *vs.* SAME.
PAUL G. CHRISTIANSEN & another *vs.* SAME.
HILDA CHRISTIANSEN *vs.* SAME.

Suffolk. March 26, 1913. — June 18, 1913.

Present: RUGG, C. J., MORTON, LORING, SHELDON, & DE COURCY, JJ.

Watercourse. Agency, Existence of relation, Independent contractor.

In an action for obstructing a natural watercourse and thus turning back the water on the plaintiff's land to his damage, there was evidence that the watercourse after crossing the plaintiff's land in a covered pipe emerged near land of the defendant, that the defendant in grading his land raised the surface of the earth about three and a half feet near the opening of the pipe, that a contractor had agreed to do the grading work for the defendant "as directed" and had caused it to be done by a subcontractor as the defendant directed, that the principal contractor, when on the land with the defendant, pointed out to the defendant the opening of the pipe and said that he had put some sticks and stones there, and that the defendant thereupon told him to leave it as it was. *Held*, that the evidence warranted a finding that the defendant had retained a directory control over the manner in which the grading was done, and that, if the watercourse was obstructed by such work, the defendant could be found to be liable for the damage caused by the obstruction.

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FOUR ACTIONS OF TORT by different plaintiffs against the same defendant, each for the alleged obstruction of a watercourse flowing through the land of the plaintiff, whereby the plaintiff's land was flooded and injured. Writs dated, the first three on August 20, 1910, and the fourth on November 29, 1912.

In the Superior Court the four cases were tried together before *Stevens*, J. The facts which could have been found upon the evidence are stated in the opinion.

At the close of the evidence the defendant asked the judge to make in each of the cases the following rulings:

"1. Upon all the evidence the defendant is entitled to a verdict in his favor as a matter of law.

"2. There are no facts upon which the jury will be warranted in finding for the plaintiff.

"3. The evidence shows that the acts complained of were those of an independent contractor, and not those of the defendant, and he is entitled to a verdict."

The judge refused to make any of these rulings, and submitted the cases to the jury, who returned a verdict for the plaintiff in each of the four cases. The defendant alleged exceptions.

J. P. Leahy, for the defendant.

S. C. Rand, (*J. L. Hall* with him,) for the plaintiffs.

RUGG, C. J. These are actions of tort, each to recover damages resulting from the obstruction of a natural watercourse whereby water came upon the plaintiff's premises. The watercourse crossed the plaintiff's land in a covered pipe which opened near to land owned by the defendant. The defendant graded his land. There was evidence tending to show that during the performance of this work earth covered the mouth of the drain, causing damages to the plaintiffs. The only question presented is whether upon any view of the evidence the defendant could be held liable. There was evidence tending to show that the defendant made a contract with one McLane to "do all rough grading as directed," and that McLane, although he let the grading to a subcontractor, caused the work to be done as the defendant directed, and that the level of the surface of the earth at the rear of the lot, near the opening of the watercourse, was raised about three feet and a half. At this place there was a slope and no retaining wall. The jury also might have found that while the defendant and McLane were

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upon the premises the latter pointed out to the defendant the opening of the pipe and said he had put some sticks and stones there. Whereupon the defendant told him to leave it as it was. It is not necessary to detail the evidence further. That which has been narrated, if believed by the jury, would justify a finding that the defendant retained an active directory control over the manner in which the grading and filling was done. If the watercourse was thereby obstructed to the damage of the plaintiffs the defendant might have been found responsible for it. *Linnehan* v. *Rollins*, 137 Mass. 123. *Mahar* v. *Steuer*, 170 Mass. 454.

Exceptions overruled.

ETHEL C. WELD *vs.* NATHAN D. A. CLARKE.

Middlesex. March 26, 1913. — June 18, 1913.

Present: RUGG, C. J., MORTON, LORING, SHELDON, & DE COURCY, JJ.

Land Court, Appeal, Amendment of issues in Superior Court. *Superior Court*, Trial of issues from Land Court. *Supreme Judicial Court*. *Writ of Entry*, Rents and profits: set-off of improvements. *Words*, "Judgment."

Where, after a trial by jury in the Superior Court of issues framed in the Land Court, the proceedings in the Superior Court have come to an end and a certificate has been sent from the clerk of the Superior Court to the Land Court under R. L. c. 128, § 14, an appeal to this court will lie under St. 1904, c. 448, § 8, (St. 1910, c. 560, § 6,) from an order of the Superior Court allowing a motion to amend one of the issues framed in the Land Court.

Where in a writ of entry brought in the Land Court, one of the issues framed for trial in the Superior Court is to determine the amount of rents and profits for which the tenant is liable, and, although the tenant seasonably has made a claim for improvements, the form of the issue does not make it plain that the tenant is entitled to a set-off for improvements against rents and profits, as provided in R. L. c. 179, §§ 17–27, the judge of the Superior Court before whom the issues are tried properly may allow an amendment of the issue to make plain the right of the tenant to a set-off for improvements.

RUGG, C. J. This is an appeal from an order of the Superior Court allowing a motion to change the issues framed in the Land Court for a trial by jury in the Superior Court. The order was interlocutory in its nature and could not be brought to this

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court by appeal until final judgment. *Cotter* v. *Nathan & Hurst Co.* 211 Mass. 31.

A case in the Land Court which goes to the Superior Court on appeal for a jury trial presents a peculiar procedure. St. 1904, c. 448, § 8, which governs the practice in this case (see also St. 1910, c. 560, §§ 6, 8), provides that "Questions of law arising in the Superior Court on such appeal may be taken by any party aggrieved by any opinion, ruling, direction or judgment of the court to the Supreme Judicial Court for revision, in the same manner as in proceedings at law in said Superior Court." There can be no judgment in a proceeding begun in the Land Court, which shall be final in the sense that it disposes of all the issues raised, except in the Land Court. Under the practice as now established by the statutes a jury in the Superior Court is the forum where alone jury trials may be had by appeal in cases pending in the Land Court. The Superior Court has no jurisdiction of such cases except for the ascertainment of facts by jury trial. The word "judgment" however, in the statute authorizing the transfer of questions of law raised in such a trial in the Superior Court directly to this court for determination must contemplate an appeal from an interlocutory judgment among the matters which may be brought directly to this court. No question of law, however, can be brought here from the Superior Court until all other proceedings in that court have come to an end. To that extent the rule of *Cotter* v. *Nathan & Hurst Co.* applies. In the case at bar proceedings had come to a conclusion in the Superior Court and a certificate had been sent by the clerk of the Superior Court to the Land Court under R. L. c. 128, § 14. Hence the case is properly before us.

This is a writ of entry. One of the issues allowed in the Land Court related to the amount of rents and profits for which the tenant was liable. R. L. c. 179, § 21, provides that in writs of entry the jury shall at the same time, when it tries the main issue of fact, determine the amount to be allowed for improvements. The tenant seasonably made a claim for improvements. R. L. c. 179, §§ 17 to 27, both inclusive, have to do with the method of allowing a tenant for improvements. Section 23 provides for a set-off of improvements against rents and profits. It is plain from reading all these sections that where there is no election by

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the demandant, as provided in § 28 and following, the question of improvements is to be heard at the same time with that of rents and profits and other damages, and the allowance to be made to the demandant is only of the balance. Apparently during the trial in the Superior Court it was doubtful whether the issue touching the amount of rents and profits, for which the tenant was liable, made plain the allowance to the tenant for improvements as it ought to have done in order to comply with the statutes and do justice between the parties, and on motion the issue was amended so as to make the question plain in this regard. It did not enlarge the issue but merely clarified it. The action of the Superior Court was well within its authority. *Luce* v. *Parsons*, 192 Mass. 8.

Judgment affirmed.

The case was submitted on briefs.

J. C. Batchelder, for the tenant.

J. Bennett, for the demandant.

MARTIN L. HALL COMPANY *vs.* COMMONWEALTH.

Suffolk. March 26, 1913. — June 18, 1913.

Present: RUGG, C. J., MORTON, LORING, SHELDON, & DE COURCY, JJ.

Tax, Excise. *Corporation*, Taxation. *Statute*, Construction.

St. 1912, c. 491, provides that the tax commissioner in assessing the valuation of corporate franchises of domestic corporations for taxation shall deduct nothing for the value of shares of stock of such a corporation held by it for its own benefit, whereas under the statutes previously in force it was his duty to deduct the value of such shares as securities which if owned by a natural person resident in this Commonwealth would not be liable to taxation. St. 1912, c. 491, was approved on April 16, 1912, and provided that it should take effect upon its passage. The tax commissioner undertook to apply it in making the assessment for the corporate franchise tax on a domestic corporation for the year 1912. *Held*, that the general rule established by St. 1909, c. 440, that all taxes shall be assessed as of April 1, applies to excises on corporate franchises as well as to direct taxes and that the deductions should be made as of the same date, so that St. 1912, c. 491, could not be applied lawfully to the assessment for the excise tax on domestic corporations for the year 1912.

Statutes imposing taxes are to be construed strictly and the right to tax is not to be extended by implication. By RUGG, C. J.

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PETITION under St. 1909, c. 490, Part III, §§ 70, 71, filed in the Supreme Judicial Court on November 25, 1912, by a corporation organized under the laws of this Commonwealth, for reimbursement for the amount of a franchise tax or excise for the year 1912 paid under protest as assessed by the tax commissioner and alleged to have been illegally exacted, alleging that the tax commissioner in making his valuation of the plaintiff's franchise failed to deduct the value of one thousand nine hundred and eighty-five shares of the common stock of the plaintiff held by it for its own benefit which by the laws in force on April 1, 1912, it was the duty of the commissioner to deduct as the value of securities which if owned by a natural person resident in this Commonwealth would not be liable to taxation.

St. 1909, c. 490, Part III, § 41, cl. 3, provides that the tax commissioner, in ascertaining the value of the corporate franchise of a domestic business corporation, shall deduct from the market value of its shares, among other things, "the value . . . of securities which if owned by a natural person resident in this Commonwealth would not be liable to taxation." St. 1910, c. 270 did not change this provision. St. 1912, c. 491, approved on April 16, 1912, amended the clause by inserting, "Nor shall there be deducted the value of any shares of stock of the corporation itself owned directly or indirectly by it or for its benefit."

The case came on to be heard by *De Courcy*, J., who reserved and reported it for determination by the full court with the following statement: "The only question in controversy is whether the assessment of a corporate franchise tax upon the petitioner for the year 1912 was subject to the provisions of St. 1912, c. 491, which took effect April 16, 1912. If the assessment of the tax was subject to the provisions of that statute, the petition is to be dismissed. If it was not subject to the provisions of that statute, a decree is to be entered in accordance with St. 1909, c. 490, Part III, § 71, adjudging that the amount of $1,070.11 of said tax as assessed by the tax commissioner, and the amount of $2.67 interest upon said tax, were illegally exacted."

M. M. Johnson, (*J. R. Benton* with him,) for the petitioner.

A. Marshall, Assistant Attorney General, for the Commonwealth.

RUGG, C. J. The question presented on this record is whether

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St. 1912, c. 491, applied to the corporation excise tax for the year 1912. That statute effected an important change in the deduction to be made by the tax commissioner from the value of the corporate franchise of domestic corporations before computing the excise. That statute was approved on April 16, 1912. St. 1909, c. 440, § 1, establishes the rule that taxes shall be assessed as of the first day of April in each year. St. 1909, c. 490, Part III, § 40, in connection with St. 1909, c. 440, requires domestic corporations to make returns to the tax commissioner in detail as to their property "as of the first day of April," while § 41 directs the tax commissioner to ascertain from the returns or otherwise the fair cash value of all shares constituting the capital stock of corporations "on the preceding first day of April." From this value certain deductions including that established by St. 1912, c. 491, are to be made. The fair implication from these repeated references to the first day of April is that that date is the one as of which all assessments, ascertainments of value and deductions are to be made. It is the contention of the Commonwealth that because the actual computations by the tax commissioner were not made until the summer of 1912, they should be made according to the law as it stood when made and not as it was on April 1. Its argument is founded chiefly on § 2 of the Act of 1912, which provides that it shall take effect on its passage, and which will be of little or no effect unless it is held to apply to the taxes of 1912. We are of opinion that this contention cannot be supported. The general rule is that taxes shall be assessed as of April 1. *Hough* v. *North Adams*, 196 Mass. 290. It is apparent from the sections to which reference has been made that this date applies to corporation excises as well as to direct taxes. The deductions should be made as of the same date. It would create great confusion in the ascertainment of corporation excises if the valuation of property to be deducted from the value of the franchise was not made as of the same date. It must be made as of some date. No other date is mentioned in the statutes. It is unreasonable to think that the Legislature could have intended that the value of the deductions should be made as of the sliding time in each year when the tax commissioner might reach each corporation in his calculations. A definite time is almost imperative in the practical administration of the law. The state of the statutes

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on the same date must govern the rights of parties. Tax laws are strictly construed. If the right to tax is not plainly conferred by the statute it is not to be extended by implication. Statutes commonly are not interpreted as retroactive in operation in the absence of a plainly expressed legislative intent to that end. It would have been simple to say that the statute should apply to excises for 1912 if that had been its purpose. The argument drawn from the section that the statute should take effect at once adds little if anything to what would have been its force without that provision, for it then would have been in effect before the excise was computed.

In accordance with the terms of the reservation decree is to be entered adjudging that the amount of $1,070.11 of tax and $2.67 of interest thereon were exacted illegally.

So ordered.

FREDERICK R. SEARS & others, executors, *vs.* INHABITANTS OF NAHANT.

Essex. March 27, 1913. — June 18, 1913.

Present: RUGG, C. J., MORTON, LORING, SHELDON, & DE COURCY, JJ.

Tax, Assessment. *Executor and Administrator.*

Where a person who is the executor of a will is also the trustee thereunder, the personal property held by him as executor is to be assessed for taxation to him as executor until under St. 1909, c. 490, Part I, § 23, cl. 7, he has made a distribution to himself as trustee which has been allowed by the Probate Court; and his giving notice to the assessors, in accordance with the requirement of that clause, of a distribution by him as executor does not constitute such a distribution. Following *Welch* v. *Boston*, 211 Mass. 178.

Under the provision of St. 1909, c. 490, Part I, § 43, that where a person bringing in a list of taxable property to the assessors of a town "is absent from the place in which the tax is to be assessed during the whole period when such oath may be made, it may be administered by a notary public," such oath may be made lawfully before a notary public by a person who is not a resident of such town but resides elsewhere in the Commonwealth, although during the period in question he has been "in the town casually."

The provision of St. 1909, c. 490, Part I, § 49, that, "after personal property has been legally assessed in any city or town to an executor, administrator or trustee, an amount not less than that last assessed by the assessors of such city or town in

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respect of such property shall be deemed to be the sum assessable, until a true list of such property is brought in to the assessors in accordance with the provisions of section forty-one," is a mandatory requirement, which the assessors must obey absolutely.

Under the provisions of St. 1909, c. 490, Part I, § 85, that, "if the real or personal estate of a person, to an amount not less than one hundred dollars and liable to taxation, has been omitted from the annual assessment of taxes in a city or town, the assessors shall between the fifteenth and twentieth days of December next ensuing assess such person for such estate," the assessors of a town lawfully may make in December such an assessment upon property in regard to which they have at that time no knowledge that they did not have on the first day of April, if the property was omitted by the assessors from assessment at the usual time in good faith through a mistake of law as to their duty.

Failure of the assessors of a town to assess for taxation to an executor on April 1 certain property known to the assessors, which such executor insisted was not taxable to him as executor because, as asserted by him, he had distributed it within the meaning of St. 1909, c. 490, Part I, § 23, cl. 7, in no way estops the assessors from performing their duty by assessing the property to the executor on December 19 under § 85 of the same statute as property that "has been omitted from the annual assessment of taxes."

Under the provision of St. 1909, c. 490, Part I, § 49, that, "after personal property has been legally assessed in any city or town to an executor, administrator or trustee, an amount not less than that last assessed by the assessors of such city or town in respect of such property shall be deemed to be the sum assessable, until a true list of such property is brought in to the assessors in accordance with the provisions of section forty-one," whatever the precise meaning of the term "true list" may be, it is plain that a list filed by an executor, which omits taxable personal property of the value of hundreds of thousands of dollars for which he is liable as executor because no account has been allowed by the Probate Court showing its transfer to the same person as trustee, even though such list was filed under an honest mistake as to the law, is not a true list within the meaning of the statute.

PETITION, under St. 1909, c. 490, Part I, § 77, filed in the Superior Court on June 19, 1911, by the executors of the will of Frederick R. Sears, late of Nahant, who died on June 27, 1907, appealing from a refusal of the assessors of the respondent to abate a tax of $36,000 upon personal property alleged to have been assessed illegally to the petitioners as such executors on December 19, 1910, for the year 1910.

The case was heard by *Bell*, J. The material facts are stated in the opinion. The judge ruled that § 49 of St. 1909, c. 490, Part I is directory and not mandatory, that § 85 applies only to property discovered after the assessment, and that the assessment made on December 19, 1910, was illegal and void. He found and ruled that the petitioners had a good cause for the delay in filing a list for 1910, and ruled that the list filed by the

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petitioners was properly sworn to. He found and ruled that the petitioners were entitled to an abatement. The respondent alleged exceptions.

P. Nichols, (*S. H. Hudson* with him,) for the respondent.

B. E. Eames, (*W. C. Rice* with him,) for the petitioners.

RUGG, C. J. This is a petition for the abatement of the taxes assessed for the year 1910 to the petitioners as executors of the will of Frederick R. Sears, who died domiciled in Nahant in June, 1907. He left personal estate of about $4,200,000, a part of which was given to kindred and a part to the petitioners as trustees to hold upon trusts. The petitioners were duly appointed both executors and trustees under the will. No list was filed with the assessors of Nahant for the year 1908 by the petitioners either as trustees or executors. In July of that year, but as of May first, the assessors assessed to the estate a tax upon personal property valued at about $100,000, and in December, acting under R. L. c. 12, § 85, the assessors made an additional assessment on omitted estate of $4,000,000. In 1909 the petitioners, asserting that they had transferred certain property from themselves as executors to themselves as trustees, in their capacity as trustees filed with the assessors a list of property held by them as trustees, but filed no list of property held by them as executors. They filed a list as trustees in 1910. The executors, however, had made no such transfer of the personal property held by them as executors to themselves as trustees as amounted to a distribution under St. 1909, c. 490, Part I, § 23, cl. 7, so as to render such property no longer taxable to them as executors, because they had filed no account in the Probate Court showing such transfer. *Welch* v. *Boston*, 211 Mass. 178. No such account was filed or allowed until March, 1911. There are no circumstances in the case at bar materially different from those disclosed in *Welch* v. *Boston* and the rule there laid down governs this aspect of the case at bar. The giving of notice of distribution by the executors to the assessors in April, 1909, under § 23, cl. 7 of St. 1909, c. 490, Part I, was of no importance in this connection. It is a requirement in addition to that for a sworn list having a quite different purpose. *Vaughan* v. *Street Commissioners*, 154 Mass. 143, 146. The legality of the assessment of the taxes of 1908 was contested. *Sears* v. *Nahant*, 205 Mass. 558. *Sears* v. *Nahant*, 208 Mass. 208. In 1909 taxes

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were assessed to the petitioners as trustees who had filed a list of property subject to taxation in Nahant on the theory that there had been a distribution to themselves as trustees. In December of that year taxes again were assessed upon the petitioners as executors upon $4,000,000 of personal property. This tax was collected under protest and an action (which is still pending) was brought by the petitioners against the town of Nahant to recover it. A like assessment was made again in December, 1910. Within six months after the receipt by the petitioners of their tax bill as executors for the year 1910 they for the first time filed a list as executors, setting out that in that capacity they had no property, and at the same time they filed a petition for the abatement of the assessment, which is the foundation of the present proceeding.

It is urged that the list filed by the executors is unavailing because not properly sworn to. St. 1909, c. 490, Part I, § 43, requires all lists to be under oath and further that "the oath may be administered by any of the assessors or by their secretary or head clerk. If the person . . . bringing such list is absent from the place in which the tax is to be assessed during the whole period when such oath may be made, it may be administered by a notary public, whose jurat shall be duly authenticated by his seal." The facts found by the Superior Court upon this point are that the executors were not residents of Nahant during the period in question, but resided elsewhere within the Commonwealth and "were in the town casually," within the period during which the list should have been filed. Under these circumstances the statute permits the list to be sworn to as this one was before a notary public. A casual presence in the town not shown to have been during business hours or under such circumstances that they might reasonably have sought the assessors does not prevent the petitioners from being "absent" from the town within the meaning of this statute. Apparently there was no refusal to appear before the assessors and answer under oath in accordance with § 46 of the statute. *Cody* v. *Spear*, 214 Mass. 241.

The next question presented is whether the assessment for the year 1910 to the petitioners as executors was a valid assessment. The assessors regularly called for lists as required by law. It is to be observed that the petitioners up to that time had

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refused persistently to file any list as executors. No account up to that time had been filed in the Probate Court. The assessors, therefore, had no means of knowledge as to the extent of the estate based upon any statement under oath by the executors. The petitioners appeared before the assessors at a hearing in 1909 and refused under advice of counsel to answer any questions touching the property received and held by them as executors. It has not been and could not be successfully argued that the assessment of the year 1908 was not legal. St. 1909, c. 490, Part I, § 49, provides that "After personal property has been legally assessed in any city or town to an executor, administrator or trustee, an amount not less than that last assessed by the assessors of such city or town in respect of such property shall be deemed to be the sum assessable, until a true list of such property is brought in to the assessors in accordance with the provisions of section forty-one." This language is unequivocal and peremptory to the effect that in making assessments, until a list is filed by the executors, an amount not less than the last assessment "shall be deemed to be the sum assessable." Unless these words are given effect as a binding direction to the assessors, in substance they would have no force at all. The tax law is plain. In the first place by § 41 everybody is required to bring in a list. If no list is furnished, of necessity the assessors are somewhat in the dark as to the property subject to taxation. When the estate of a deceased person is in process of settlement, the list is not only required but the assessors are forbidden to diminish the first assessment made upon the estate until a list is filed. It well might be that the entire amount of personal property assessed the first year should be paid out in debts or distributed in fact and yet there might remain a large amount of taxable property undisclosed in the hands of the executors. The peremptory terms of § 49 guard the assessors from being misled by representations of this kind without a full disclosure of the entire estate subject to taxation.

It therefore is the duty of assessors not to diminish the amount for which executors are taxed after a legal assessment to them once has been made until a list has been brought in. The first valid assessment against executors determines the basis of succeeding assessments until a list is brought in or a distribution made. In

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Blackie v. *Boston*, 208 Mass. 188, it was held that this statute did not prevent an increase of an assessment upon executors over that of the preceding year in the absence of a list, provided the previous assessment was found to be too small, but it was said that this section "is given full effect by treating it only as a limitation, preventing a taxation for a less amount until a true list is brought in as required by law." The implication of this language plainly is in accordance with the conclusion now reached. Intimations to the same effect are found in *Vaughan* v. *Street Commissioners*, 154 Mass. 143, and in *Batchelder* v. *Cambridge*, 176 Mass. 384.

It is argued earnestly, however, that the assessors did not follow the course required by the statute for the reason that the assessment of 1910 was not laid until December, and that as matter of law the assessors at that time, having failed to assess the property at the usual time, had no authority to assess it under St. 1909, c. 490, Part I, § 85,* as an omitted assessment. It was found by the Superior Court that the assessors had no new knowledge respecting this property in December, 1910, in addition to that which they had in April. Therefore it is urged that it was not newly discovered property and hence could not lawfully be assessed. But we are of the opinion that § 85 as to omitted assessments does not require that the property be newly discovered in the sense of coming for the first time to the knowledge of the assessors, in order that it may be legally assessed. If the assessors, through want of knowledge of facts or ignorance of the law as to their duty, or for any other honest reason have failed to include property in the annual assessment, it is omitted property within the meaning of that section, and in the exercise of good faith, they may include it in a supplemental assessment. In the case at bar there is no finding of bad faith on the part of the assessors, so it is not necessary to determine what its effect might be. The circumstances disclosed were such as well might have left the assessors in doubt as to the course they ought to pursue. The petitioners were refusing to comply with the requirement by the statute that they

* That section contains the following provision: "If the real or personal estate of a person, to an amount not less than one hundred dollars and liable to taxation, has been omitted from the annual assessment of taxes in a city or town, the assessors shall between the fifteenth and twentieth days of December next ensuing assess such person for such estate."

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bring in a true list as executors and were conducting three different forms of action against the assessors and the town for the purpose of contesting the validity of earlier assessments. Under these circumstances hesitation in acting does not render illegal their conduct in finally following the plain language of the statute requiring the continuance of the assessment of the year before.

The failure to assess until December created no estoppel in favor of the petitioners. The parties were not on an equal footing. The petitioners were trying to settle the estate without filing any list with the assessors as required by law. They knew and the assessors did not know the character and items of personal property which came to their hands as executors. Failure on the part of public officers at the earliest moment available to them to perform their statutory obligation does not work an estoppel against such performance at a later time but within that permitted by law. No true list has ever been filed by the executors so far as disclosed on this record. It is plain that the list filed by the petitioners for the year 1910 was not a true list. Under the decision of *Welch* v. *Boston*, 211 Mass. 178, which simply affirmed the earlier case of *Hardy* v. *Yarmouth*, 6 Allen, 277, the petitioners were liable to taxation as executors for the amounts given them as trustees until their account as executors showing a distribution to themselves as trustees had been allowed in the Probate Court. It is therefore immaterial that the Superior Court has found that there was a reasonable excuse in 1910 for the petitioners not to bring in a list within the time limited by § 41. The power to grant an abatement under §§ 72 to 83, both inclusive, of the tax law, is subject to the imperative provision of § 49 to the effect that the assessment of personal property in the hands of executors shall not be diminished until a true list has been filed.

It is not necessary to determine the precise meaning of "true list" for it is plain that a list which omitted hundreds of thousands of dollars of the taxable property for which the executors still were liable because no account had been allowed by the Probate Court showing its transfer to them as trustees, even though filed under an honest mistake as to the law is not a "true list." It follows that the assessment for 1910 was valid and that the petitioners having failed to file a true list are not entitled to an abatement.

Although we have nothing to do in this proceeding with the

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taxes assessed to the petitioners as trustees for 1910, it is urged that this is a harsh result and this view seems to have appealed to the Superior Court. But the direct and immediate cause of this result is the initial refusal of the petitioners, persisted in during more than three years, to follow the plain and explicit requirement of the statute seasonably to file a list of the property which came to their hands as executors. A primary compliance with this law would have afforded full protection for their rights. The consequences of this failure, also plainly set forth in the tax law, offers no just ground for complaint. It falls far short of invading any constitutional right of the petitioners as executors.

Exceptions sustained.

JOHN B. ADDUCI *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. March 28, 1913. — June 18, 1913.

Present: RUGG, C. J., MORTON, LORING, SHELDON, & DE COURCY, JJ.

Negligence, Street railway. *Carrier*, Of passengers.

It is not evidence of negligence on the part of a street railway corporation, that it operated an eight wheeled open passenger car having upon the running board on each side four iron wheel guards about twelve inches high which extended half the width of the running board, and that a passenger was injured by reason of stepping on one of these guards in alighting from the car, where it also appears that cars of this type had been in common use for more than four years.

While a common carrier of passengers is bound to adopt approved appliances that are in general use and necessary for the safety of passengers, it is not obliged to discard those that always have been found to be adequate and safe merely because they may be a possible source of danger to a passenger who uses them for a purpose for which they were not intended. By DE COURCY, J.

TORT for personal injuries, sustained when the plaintiff was alighting as a passenger from an eight wheeled open street railway car operated by the defendant on Neponset Avenue in that part of Boston called Dorchester, and alleged to have been caused by a dangerous and defective condition of the car. Writ dated July 21, 1911.

In the Superior Court the case was tried before *Hall*, J. At

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the close of the plaintiff's evidence, which showed the facts stated in the opinion, the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

J. M. Graham, for the plaintiff.

R. A. Sears & C. S. French, for the defendant, submitted a brief.

DE COURCY, J. The plaintiff was a passenger on an eight wheeled open car. It appears from the testimony and the photographs that on either side and close to the framework were four iron wheel guards, each about twelve inches high, fifteen inches long and extending out upon the running board about half its width, or seven inches. While the plaintiff was in the act of alighting from the car his foot struck the guard that was opposite the end of his seat and he slipped to the ground, receiving the injuries complained of. The car was stationary at the time. The plaintiff does not contend that the evidence discloses any negligence on the part of the defendant aside from the presence of this sheath over the wheel as a part of the permanent construction of the car. It was not in a defective condition, and was in plain sight to every one that got on the running board.

While a common carrier is bound to exercise a high degree of care and diligence in the selection, maintenance, inspection and use of its cars and their appliances, it is not required to provide immediately and regardless of expense every new equipment that human skill and ingenuity devises to prevent accidents. It is bound to adopt approved appliances that are in general use and necessary for the safety of passengers, but it is not obliged to discard those that always have been found to be adequate and safe merely because they may be a possible source of danger to a passenger using them for a purpose for which they were not intended. *Mullen* v. *Springfield Street Railway*, 164 Mass. 450. *Gargan* v. *West End Street Railway*, 176 Mass. 106. *Byron* v. *Lynn & Boston Railroad*, 177 Mass. 303. *Farley* v. *Philadelphia Traction Co.* 132 Penn. St. 58. *Howell* v. *Union Traction Co.* 202 Penn. St. 338. *Werbowlsky* v. *Fort Wayne & Elmwood Railway*, 86 Mich. 236. *Lorimer* v. *St. Paul City Railway*, 48 Minn. 391. *Witsell* v. *West Asheville & Sulphur Springs Railway*, 120 N. C. 557.

In the case at bar the plaintiff's evidence does not go far enough to show any failure of duty on the part of the defendant. Even

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disregarding the fact that this was the car of another company, there was no evidence to show that it was customary or even feasible to dispense with the wheel guard at this place, or to provide one that was safer or better than the one actually used; and it affirmatively appeared that cars of this type of construction had been in common use for more than four years. *Carney* v. *Boston Elevated Railway*, 212 Mass. 179. *Spoatea* v. *Berkshire Street Railway*, 212 Mass. 599.

Without considering the issue of the plaintiff's due care, we are of opinion that on the evidence presented the jury would not be warranted in finding negligence on the part of the defendant, and the judge rightly directed a verdict in its favor.

Exceptions overruled.

ERNEST PERRY *vs.* DAVIS AND SARGENT LUMBER COMPANY.

Middlesex. March 28, 1913. — June 18, 1913.

Present: RUGG, C. J., MORTON, LORING, SHELDON, & DE COURCY, JJ.

Negligence, Employer's liability.

An employee in a lumber mill does not assume as a part of his contract of employment the risk of injury from the giving way of a board nailed to two posts at the side of a passageway in the mill adjoining an open cellar, if the open cellar was constructed and the board was nailed to the posts after his employment had begun; and if, in an action by such employee against his employer for injuries caused by his falling into the cellar when the board gave way, there is conflicting evidence as to whether the plaintiff understood the nature and extent of the danger, and there is evidence on which it can be found that the only other way by which the plaintiff could have passed was equally obstructed and unsafe, the questions, whether the plaintiff assumed the risk of the injury and whether he was in the exercise of due care, are questions of fact for the jury.

In an action by a sawyer in a lumber mill against his employer for personal injuries sustained from the giving way of a board nailed to two posts by the side of a passageway in the mill adjoining an open cellar, into which the plaintiff fell, it appeared, that, if the board was merely a warning to indicate the place where the floor ended and the cellar began, the defendant was not negligent, but that, if the board was a railing intended to afford some degree of support, it might have been found that it was insecure and insufficient for that purpose, and that, if the passageway was found to be one where the employees were

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expected to pass and repass constantly, it might have been inferred that the board was a guard rail and not a mere notice. *Held*, that the question of the defendant's negligence was for the jury.

TORT by a sawyer, employed in the lumber mill of the defendant at Lowell, for personal injuries sustained on October 26, 1911, when the plaintiff in the course of his employment was passing along a passageway in the mill and was thrown into a cellar by the giving way of a railing, alleged to be unsafe and dangerous. Writ dated January 20, 1912.

In the Superior Court the case was tried before *Stevens*, J. At the close of the evidence, which is described in the opinion, the judge ordered a verdict for the defendant and reported the case for determination by this court, with a stipulation of the parties that, if the ordering of the verdict was wrong, judgment was to be entered for the plaintiff in the sum of $1,000.

A. S. Howard, for the plaintiff.

F. E. Dunbar, for the defendant.

RUGG, C. J. This is an action of tort to recover for personal injuries received by the plaintiff while in the employ of the defendant. The plaintiff rightly was going from his place of work at a saw bench to another room in the defendant's shop. Although the evidence was conflicting, it might have been found that there were two paths, one by the main aisle of the shop obstructed by a pile of boards four or five feet high, over which he would be obliged to climb, if he went that way, and the other by a passageway adjacent to a lumber cellar constructed subsequently to the beginning of the plaintiff's employment, in which was a pile of small stakes about four feet wide and a foot high extending across the passage. The plaintiff chose the latter course. As he was walking along with one hand on a board about three feet above the floor and extending between two posts, the stakes rolled under his feet and his weight bearing more heavily upon the board it gave way and he fell to the cellar receiving injuries for which he now seeks to recover.

There was evidence sufficient to warrant a finding that the plaintiff was in the exercise of due care. It might have been found that each of the ways which must be traversed in order to reach the room to which he was going was somewhat obstructed. It could not have been ruled as matter of law upon the evidence that one

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was safer than the other. Nor could it have been ruled as a matter of law that the plaintiff assumed the risk. The dangerous condition including the nailing of the board was one which had arisen since his employment and hence there was no contractual assumption of it. Whether the plaintiff understood the nature and extent of the danger was a question of fact.

It is a close question whether there was evidence sufficient to support a finding of negligence on the part of the defendant. The pile of stakes was not a permanent condition and one which the plaintiff knew as much about as any one. The board which gave way was three inches wide, one inch thick and eight feet long. One end was nailed to the side of a small post facing into the room and the other end was nailed to the side of a larger post facing toward the lumber cellar, there being two nails to hold each end. It was about three feet above the floor and the nails pulled out of the posts and allowed the plaintiff to fall. If this board was merely a warning to indicate the place where the floor ended and the cellar began, the defendant was not negligent. If, however, it was a railing intended to afford some degree of support, then it might have been found to be insufficient or insecure for that purpose. We incline to the view on the whole case that whether it was a warning or a railing was a question of fact and should have been submitted to the jury. If the space adjacent to it was found to be a place where the help were expected to pass and repass constantly, it might have been reasonable to infer that this was a guard and not a mere notice.

In accordance with the terms of the report let the entry be

Judgment for the plaintiff for $1,000.

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GERTRUDE E. ROBERTS *vs.* ANHEUSER BUSCH BREWING ASSOCIATION.

GERTRUDE E. ROBERTS, administratrix, *vs.* SAME.

Suffolk. March 28, 1913. — June 18, 1913.

Present: RUGG, C. J., MORTON, LORING, SHELDON, & DE COURCY, JJ.

Jurisdiction. Attachment. Corporation, Foreign. *Supplementary Process. Practice, Civil,* Motion to dismiss.

By the provisions of R. L. c. 170, § 1, a foreign corporation, like a natural person not an inhabitant of this Commonwealth, cannot be sued in this Commonwealth unless it has been served with process within the Commonwealth or unless an effectual attachment of its property within the Commonwealth has been made upon the original writ. And, where there has been no such service or attachment, jurisdiction cannot be acquired by a subsequent attachment made by supplementary process under R. L. c. 167, § 80.

Where facts which show a want of jurisdiction in an attempted action appear upon the record, the proper way for the defendant to raise the objection is by a motion to dismiss.

TWO ACTIONS OF TORT against a corporation organized under the laws of the State of Missouri, the first by the plaintiff individually and the second by her as the administratrix of the estate of John Joseph Roberts, for injuries to the plaintiff and for suffering and death of the plaintiff's intestate alleged to have been caused by taking a substance called "Malt Nutrine" manufactured by the defendant and advertised by it as being extremely healthful and nutritious for children requiring nourishment and strength. Writs dated April 1 and 2, 1909.

The special precepts issued as supplementary process, which are mentioned in the opinion, were dated June 8, 1911.

On May 15, 1912, the defendant appeared specially for the purpose of objecting to the jurisdiction of the court and filed motions that the actions be dismissed.

In the Superior Court the motions were heard by *Pierce,* J. The material facts which appeared by the record are stated in the opinion. The judge ordered that the actions be dismissed; and the plaintiff individually and as administratrix alleged exceptions.

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O. Storer, for the plaintiff.

A. L. Fish, for the defendant.

SHELDON, J. The defendant in each of these cases is a foreign corporation; it has not been served with process; no effectual attachment of its property was made upon the original writ. These facts bring the case within the exact language of R. L. c. 170, § 1; and if nothing more appears, it follows that the motion to dismiss was rightly allowed.

But the plaintiff contends that the attachments made upon the special precepts which were issued about two years after the entry of the action in court were and are sufficient to give the court jurisdiction to render a judgment in her favor which shall be valid and enforceable against the property attached. The precepts were issued under the authority of R. L. c. 167, § 80. This is a codification of statutes which were passed some years after the enactment of the statute now contained in R. L. c. 170, § 1, and the plaintiff contends that it ought to be construed as modifying or repealing in part the earlier act so far as to allow an action to be maintained against a non-resident defendant, though not personally served on, if an effectual attachment of his property within the Commonwealth is made either upon the original writ or upon the later special precept. There is plausibility in the argument, but it now cannot be sustained. In the revision of 1901 the Legislature included both these statutes in the Revised Laws, unchanged in any substantial respect. This manifests the legislative intention to continue in full force, unchanged by other legislation, the provisions of Pub. Sts. c. 164, § 1, now embodied in R. L. c. 170, § 1. We cannot treat a statute as repealed in part or altered by other legislation in the face of its later affirmation by the Legislature. The language used in *Pease* v. *Whitney*, 5 Mass. 380, 381, 382, and in *Commonwealth* v. *Kimball*, 21 Pick. 373, 377, does not apply in such a case.

The only original writs in these cases were the writs by which the actions were begun. The special precepts were merely supplementary process. The provision in R. L. c. 167, § 81, that the precept "may be served by an officer authorized to serve the original process," shows that the Legislature did not regard the new precept as itself constituting original process or an original writ. See *Clark* v. *Paine*, 11 Pick. 66, 67. The same distinction has

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been made elsewhere. *Walsh* v. *Haswell*, 11 Vt. 85, 88. *Pressey* v. *Snow*, 81 Maine, 288. *Birmingham Dry Goods Co.* v. *Bledsoe*, 113 Ala. 418, 419. 6 Words & Phrases, 5064. 21 Am. & Eng. Encyc. of Law, (2d ed.) 1008. 29 Cyc. 1529. Alderson on Judicial Writs & Process, §§ 5 *et seq.*

The plaintiff can derive no comfort from the language of R. L. c. 167, § 79. The service of the original writ was not, so far as concerns the question before us, defective or insufficient within the meaning of that section. If there was any defect or insufficiency, it was in the original writ, which did not contain the names of the alleged trustees whom it was sought afterwards to bring in by means of the special precepts. The original writ was properly served upon the only trustee named therein; and there was no desire or attempt to make further personal service upon the defendant. No other or further service could have been made upon the original writ as it stood; and the express language of the section is that "upon due service thereof [that is, of the supplemental process], the court or tribunal shall thereby acquire the same jurisdiction of the subject and of the parties as it would have obtained if such service had been made in pursuance of the original writ, process or order." No service of the original writ upon the parties named in the special precepts could have given the court jurisdiction over them or over the action, because they were not named in the original writ. And in this section, as in § 81, the language of the Legislature makes a clear distinction between the original writ and the further process which it authorizes. A different question would have been presented if the names of the additional alleged trustees had been seasonably inserted in the original writ and they had been duly served upon before the entry of the action in court, under the authority given by R. L. c. 189, § 7.

The defendant as a foreign corporation is in the same position as a non-resident individual. R. L. c. 126, § 9. St. 1903, c. 437, § 62.

As the facts relied on by the defendant appeared upon the record, a motion to dismiss was the proper way to raise the question. *Nye* v. *Liscombe*, 21 Pick. 263, 266. *Simonds* v. *Parker*, 1 Met. 508, 511. *Amidown* v. *Peck*, 11 Met. 467, 468.

Exceptions overruled.

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CHARLES S. NORRIS, executor, *vs.* CHARLES W. LOOMIS & others.

Middlesex. March 28, 1913. — June 18, 1913.

Present: RUGG, C. J., MORTON, LORING, SHELDON, & DE COURCY, JJ.

Charity. Trust, Charitable.

A widow by her will devised her former residence "for an Old Folks Home, both male and female, of Evangelical Creed." She bequeathed the proceeds from the sale of another house and certain bank deposits for the purpose of carrying on this Old Folks Home, designating it by her family name and by the number and street of the house intended for it. She expressed a desire that a certain woman should have a home there whenever she wished. The house given was not suitable for an old folks' home and the entire property devoted to the home by the will was about $23,000, which was insufficient for the purpose. It was uncertain how much money would be required and how long the fund given would have to be held to produce by accumulation the sum necessary for the purpose. *Held,* that the gift was one for a charitable use; that the will manifested a general charitable intent to found an old folks' home and that the gift was not so limited to the particular building or place as to disclose an intention that it should not be applied elsewhere, and therefore that a scheme should be devised for the administration of the trust according to the doctrine of *cy pres.*

BILL IN EQUITY, filed in the Probate Court for the county of Middlesex on May 23, 1912, by the executor of the will of Frances F. Tabor for instructions.

On appeal, the case came on to be heard before *De Courcy,* J., who reserved it upon the pleadings and an agreed statement of facts for determination by the full court.

Frances F. Tabor was a widow. She died on December 26, 1909, leaving as her only heirs at law and next of kin thirteen first cousins. Her will was dated May 1, 1902. A codicil, in which she ratified the will except as to the appointment of executors, was dated December 19, 1909.

The first provisions of the will were the following:

"I give my present residence, 4 Lewis Ave. Arlington, Mass. for an Old Folks Home, both male and female, of Evangelical Creed, most of the furnishings of the said House to go with the House and Land of said Estate for the use of the Old Folks.

"I give the house and Land 14 Prospect, St. Malden, Mass. for

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to be sold for funds to carry on the Old Folks Home. If it should be sold previous, then the funds received, to be used for the carrying on of the Old Folks Home."

Among the bequests in her will were the following:

"What is in the Five Cent S. Bk. School St. Boston, and also in the Union. S. Bk. 216 Tremont St. Boston and the Wildey S. Bk. 52 Boylston St. Boston, Mass. I give for the carrying on of the Old Folks Home, to be called The Tabor Home, 4 Lewis Ave. Arlington Mass. . . . I give what is in the Arlington. S. Bk. and National, Bk. in Arlington, for the Tabor Old Folks Home. . . . What is in the Malden, Trust Co. after all debts are paid, I give for to carry on the Old Folks Home, as Maud Smith the child I mostly brought up will lose her home by my death, I wish for to have a home whenever she wishes, at the Tabor Old Folks Home."

The other material facts are stated in the opinion.

A. J. Plummer, for the plaintiff, stated the case.

F. W. Fosdick, for the defendants.

H. M. Hutchings, Assistant Attorney General, for the Attorney General.

RUGG, C. J. There is no doubt, under the general principles of charitable trusts, of the validity of the provisions of the will of the testatrix for the establishment of an "Old Folks Home, both male and female, of Evangelical Creed." The relief of the poor of a particular church and the amelioration of the condition of the aged of a specified religious belief is a charitable use. Even though the gift is limited to a certain class, the number to be benefited is indefinite and the purpose has always been regarded as charitable. *Attorney General* v. *Old South Society*, 13 Allen, 474. *Sohier* v. *Burr*, 127 Mass. 221. *Sears* v. *Attorney General*, 193 Mass. 551. *Masonic Education & Charity Trust* v. *Boston*, 201 Mass. 320, 325. *Little* v. *Newburyport*, 210 Mass. 414. The heirs at law rely upon *Troutman* v. *De Boissiere Odd Fellows' Home*, 66 Kans. 1. But we cannot follow that case, which is contrary to our own decisions and the great weight of authority. See cases in 6 Cyc. 924, 925.

The facts are that the house referred to in the will is not suitable in size or arrangement for such a Home as the will of the testatrix contemplated. The entire property devoted to this charity

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by the will amounts to about $23,000, which it is agreed is insufficient to establish and maintain such a Home, "and it is altogether problematical and uncertain how much money would be required and how long it would take to accumulate the funds necessary for such a purpose." It is therefore impossible at present to carry out the terms of the will precisely according to the intent of the testatrix. The questions to be decided are: first, does the gift fail; second, shall the property be held to accumulate until sufficient in amount to establish a Home; or third, shall it be administered according to the doctrine of *cy pres*, or distributed among the heirs at law of the testatrix. The will is informal, but on the whole we are inclined to think it manifests a general charitable intent as to the founding of the Old Folks' Home, and that it is not so limited to the particular building or place as to disclose an intention that it be devoted to no other purpose. It is apparent that the testatrix intended to dispose of her entire property. She made a large number of specific gifts of articles of personal property, but most of her estate is given to charitable objects. The method pursued by her of enumerating deposits in several different banks as gifts for the support of the Home emphasizes the general purpose to benefit such an institution. The dominating design disclosed by the will is the establishment of the Old Folks' Home. The appropriation of the Arlington house to that use is rather the incidental than the primary aim. The beneficiaries are not limited to the particular neighborhood, nor are those of any locality given a preference. The paramount purpose was to establish a Home for the benefit of the general class designated, with a special provision later in the will that a woman whom she had "mostly brought up" from childhood should have a home there whenever she wished. The precise method of accomplishing the charitable purpose was not of the essence of the gift, nor so important in her thought as the general relief of the dependent class uppermost in her mind. The testatrix's desire that the Home should bear her name may be accomplished by perpetuating the name "Tabor" in connection with the framing of a scheme for the administration of the trust. Although the case is close upon this point, we incline to the view that it falls within the class of which *Richardson* v. *Mullery*, 200 Mass. 247, and *Ely* v. *Attorney General*, 202 Mass. 545, are illustrations. The case

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is distinguishable from *Teele* v. *Bishop of Derry*, 168 Mass. 341, *Bowden* v. *Brown*, 200 Mass. 269, and like cases.

The uncertainty as to the time necessary to accumulate funds sufficient to found a Home such as the testatrix had in mind, together with all the other facts disclosed, bring the case within the decision of *Ely* v. *Attorney General*, 202 Mass. 545, and *Grimke* v. *Attorney General*, 206 Mass. 49, to the effect that the funds should not be held for accumulation. The facts in the case at bar are almost identical with those in the two cases cited.

It follows from what has already been said that the funds should be administered according to the doctrine of *cy pres*.

Decree of Probate Court affirmed.

CONSEIL ROCHAMBEAU NO. 128, DE L'UNION SAINT JEAN BAPTISTE D'AMÉRIQUE *vs.* WILLIAM J. LAFLEUR & others.

Hampshire. March 28, 1913. — June 18, 1913.

Present: RUGG, C. J., MORTON, LORING, SHELDON, & DE COURCY, JJ.

Fraternal Beneficiary Corporation. Equity Pleading and Practice, Exceptions to master's report.

R. L. c. 119, § 11, amended by St. 1908, c. 463, does not authorize a fraternal beneficiary corporation to transfer its membership to a council of a corporation organized under the laws of another State. In the present case, if the statute had been applicable, the attempted transfer would have been of no effect, because it did not appear that the requirements of the statute had been complied with.

In a suit in equity exceptions to a master's report cannot be taken merely by filing with the master objections to his report entitled "Objections and exceptions."

BILL IN EQUITY, filed in the Superior Court on October 2, 1909, and amended on December 27, 1910, the plaintiffs by the amendment being alleged to be members of a fraternal beneficiary society composed of French-speaking people in the town of Northampton, called the Conseil Rochambeau No. 128 de L'Union Saint Jean Baptiste d'Amérique, a subordinate council of a corporation organized under the laws of the State of Rhode Island, bringing the bill for themselves and other members against two individual defendants, two savings banks and a co-operative bank, praying

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that the defendants might be ordered to turn over to the plaintiffs certain moneys deposited in the defendant banks.

By an order of court L'Union Saint Joseph, a corporation organized under the laws of this Commonwealth, was made a defendant.

The case was referred to John W. Mason, Esquire, as master, who at different stages of the case made a first and a second report.

The case was heard upon the two reports of the master by *Raymond*, J., who made a final decree, ordering the individual defendants to transfer to the plaintiffs the deposits in the defendant Northampton Institution for Savings and the defendant Northampton Co-operative Bank standing in the name of L'Union Saint Joseph Society of Northampton, and ordering the defendant Northampton Co-operative Bank also to transfer to the plaintiffs ten shares of "the capital to be accumulated" standing in the name of L'Union Saint Joseph Society of Northampton. The defendants appealed from the decree.

The case was submitted on briefs.

J. C. Hammond, for the defendants La Fleur, Lariviere and L'Union Saint Joseph.

W. J. Reilley, for the plaintiffs.

SHELDON, J. It is not necessary to consider many of the questions which have been discussed in the briefs. The individual defendants held the funds in their hands as officers of L'Union Saint Joseph. That was a fraternal beneficiary society incorporated under the laws of Massachusetts. The attempted amalgamation or consolidation of this Massachusetts corporation with the Rhode Island corporation called L'Union Saint Jean Baptiste d'Amérique, or the transfer of its membership to a new council of that foreign corporation, was inefficacious and void, because it does not appear that it was "submitted to and approved by a two thirds vote of the certificate holders of each corporation." Nor was there a compliance with the other statutory requirements. R. L. c. 119, § 11. St. 1908, c. 463, has no application, because the Rhode Island corporation was not organized under the laws of this Commonwealth. Nor has the legal existence of this Massachusetts corporation been terminated in any other way. R. L. c. 119. St. 1911, c. 628. That being so, the facts found by the master do not show that the title to the corporate property has

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been transferred or has passed in any way to the plaintiffs or to the voluntary association called Conseil Rochambeau, which they represent. It follows that the bill cannot be maintained.

There may be force in the plaintiffs' contention that the present alleged officers of the corporation have not been regularly elected or appointed to their respective positions. Perhaps also the present difficulties can be cured only by proper action to be taken at a full meeting duly called and with notice to all the members of the corporation. But however that may be, it does not help the plaintiffs. They show no title to the funds in dispute.

There are some errors and irregularities in the decree which would require correction if the bill could be maintained, but these need not now be noticed.

No exceptions to the master's report were filed in the Superior Court. The filing with the master of objections to his report was not enough, although these were entitled "Objections and exceptions."

The bill should have been dismissed with costs to the respective defendants.

Decree reversed.

COMMONWEALTH *vs.* HYMAN GUSSMAN.

Suffolk. May 19, 1913. — June 18, 1913.

Present: RUGG, C. J., HAMMOND, LORING, SHELDON, & DE COURCY, JJ.

Weights and Measures. Constitutional Law. Interstate Commerce.

St. 1902, c. 115, providing that a barrel of sweet potatoes shall contain one hundred and fifty pounds, is not a regulation of interstate commerce, and is constitutional.

St. 1907, c. 394, as amended by St. 1911, c. 163, providing that whoever gives or attempts to give false or insufficient measure shall be punished as there stated, is constitutional, and is not unconstitutional as applied to a sale by insufficient measure of a barrel of sweet potatoes in the original package in which they were brought from another State.

COMPLAINT in the Municipal Court of the City of Boston under St. 1907, c. 394, as amended by St. 1911, c. 163, charging that the defendant on August 26, 1912, sold as a barrel of sweet potatoes a package containing sweet potatoes weighing only one hundred

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and twenty-nine pounds in violation of R. L. c. 62, § 3, as amended by St. 1902, c. 115, and St. 1911, c. 397.

On appeal to the Superior Court the case was tried before *Brown*, J., upon an agreed statement of facts, stated in substance in the opinion. The defendant asked the judge to rule, that upon all the evidence the defendant was entitled to a verdict of not guilty; that St. 1907, c. 394, and St. 1911, c. 163, are unconstitutional; that St. 1902, c. 115, and St. 1911, c. 397, are unconstitutional; that the statutes above named are an interference with commerce among the several States; that no State has the right to fix by legislation the standard of weights and measures; and that the statutes above named are inoperative and void in relation to a sale in the original package. The judge refused to make any of the rulings requested by the defendant, and the jury returned a verdict of guilty. The defendant alleged exceptions.

The case was submitted on briefs.

J. S. Spencer, for the defendant.

A. C. Webber, Assistant District Attorney, for the Commonwealth.

RUGG, C. J. This complaint charges that the defendant sold as and for a barrel of sweet potatoes a quantity much less than one hundred and fifty pounds, the standard weight therefor established by St. 1902, c. 115. The agreed facts are that the defendant bought two hundred barrels of sweet potatoes in the State of Maryland, which were shipped to him at Boston in interstate commerce. Just as a team loaded with some of these barrels on its way from the freight station had reached the defendant's place of business, he sold from it a single barrel in the same condition in which it had come from Maryland, the contents of which weighed one hundred and twenty-nine pounds.

The defendant presented many requests, which raise in various forms the constitutionality of the statute. It is contended that the statute is a direct regulation of interstate commerce. But this is not so. It does not affect interstate commerce in any degree. It imposes no burden upon it. It simply provides that in this Commonwealth when one sells sweet potatoes by the barrel this shall mean not less than one hundred and fifty pounds in weight. The statute makes no provision against selling in the original package in which the potatoes came from another State. It does not

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directly or indirectly affect such a sale. The defendant might have sold this barrel by weight or in any other way except as and for a barrel of sweet potatoes, without hindrance. The effect of our statute is that when such goods are sold by the barrel that shall mean a certain weight. No question as to freedom of interstate commerce is raised on this record. It is an ancient and perfectly well settled branch of the legislative power of the State to enact statutes as to the weight in avoirdupois of potatoes, grain and other articles commonly bought and sold by dry measure.

Congress has not undertaken to cover this subject under its authority "to fix the standard of weights and measures." Hence it is not necessary to discuss the limits of its power in that direction. The field is left open in this regard to the several States.

There is no discrimination in this statute against goods brought here from another State. The extent of this statute is that it defines the meaning in weight of the term barrel, and imposes a penalty upon all who sell under that description less than the required number of pounds. The statute is simply an attempt to protect the public against fraud or cheating in the sale of these articles and to insure to all like measure when buying sweet potatoes by the barrel. This is well within the power of the Legislature and violates no provision of the State or Federal Constitution.

Exceptions overruled.

ALBERT J. NORWOOD *vs.* HELEN J. DODGE, administratrix.

Suffolk. May 19, 1913. — June 18, 1913.

Present: RUGG, C. J., LORING, BRALEY, SHELDON, & DE COURCY, JJ.

Attorney at Law. Rules of Court.

Rule 3 of the Superior Court, which prescribes that the right of an attorney to appear shall not be questioned by the opposite party unless the objection be taken in writing within ten days after his appearance, has the force of law in proceedings in that court.

RUGG, C. J. This is an action of contract against the estate of a decedent to recover for board, washing and nursing. It

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was brought in the Municipal Court of the City of Boston and on appeal came on for trial in the Superior Court. Before the jury was impanelled the defendant orally objected to the counsel of record for the plaintiff acting for her on the ground that he had previously been of counsel for the estate of the defendant's intestate in the same matter. Later a written motion was filed to the same effect. The defendant's exceptions to the refusal by the judge* to direct the plaintiff's counsel not to proceed brings the case here. Rule 3 of the Superior Court, provides that "the right of an attorney of this court to appear for any party shall not be questioned by the opposite party, unless the objection be taken in writing within ten days after his appearance." This rule was well within the authority of the Superior Court and had the force of law. *Pratt* v. *Pratt*, 157 Mass. 503. It was not complied with and hence the defendant has no ground of exception. The wisdom of the rule is well illustrated by the proceedings in this case.

The parties were in court ready to try to a jury issues of fact raised by the pleadings. The right of an attorney to appear for one of the parties had no connection whatever with the rights of the respective parties touching the matters to be tried in the action. To interject at this stage a collateral matter having nothing to do with the merits of the case could not fail to be distracting and might work injustice.

The conduct of the trial judge was not open to exception in the respects complained of.

Exceptions overruled.

The case was submitted on briefs.

C. W. Rowley, for the defendant.

J. Cummings, for the plaintiff.

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* *Hitchcock*, J.

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EARNEST E. SMITH *vs.* COMMISSIONER OF PUBLIC WORKS OF BOSTON.

Suffolk. May 19, 1913. — June 18, 1913.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DE COURCY, JJ.

Mandamus. Municipal Corporations. Boston.

The granting of a writ of mandamus is not a matter of right but of sound judicial discretion.

The commissioner of public works of the city of Boston is not required by the charter of that city to expend a large sum of money for the purchase of gas lamps and other apparatus for street illumination merely because the money has been appropriated for that purpose by the city council, and a writ of mandamus to compel such commissioner to spend the money for the purpose designated properly may be refused if it appears that the commissioner believes on apparently substantial grounds that such an expenditure would be unwise for the city.

RUGG, C. J. This is a petition for a writ of mandamus. It was heard by a single justice,* who refused to issue the writ so far as it rested in his discretion, and reported the case.

Mandamus is not a writ of right, and it is granted only in the exercise of sound judicial discretion. *Hill* v. *County Commissioners*, 4 Gray, 414. *Murray* v. *Stevens*, 110 Mass. 95. *McCarthy* v. *Street Commissioners*, 188 Mass. 338, 340. The facts are that the city council of Boston appropriated in May, 1911, $300,000 to be expended by the department of public works for the purchase of gas lamps and other apparatus for street illumination, and this amount of money is now available for that use. The respondent as commissioner of public works has refused to make the purchases authorized in this order. He was at the time of the passage of the order conducting independent investigations as to the most practical and economical system of municipal lighting, and is of opinion that, because of the initial cost and maintenance expense of the equipment for illumination by gas and the necessity for a large investment by the city, the most practical and economical system of municipal lighting is by electricity. It is not

* *Braley*, J.

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necessary to state at length his reasons, but they may be summarized by saying that both on grounds of efficiency and economy he believes public interest will be far better served by not making the purchase authorized by the appropriation, and that a large amount of money may be saved to the municipal treasury by making a contract for electric lighting with a company which for many years past has illuminated a large portion of the city. It is plain under these circumstances that the respondent ought not to be compelled to spend this large amount of money for a purpose which according to his belief, apparently supported by substantial reasons, would be unwise for the city, unless absolutely compelled by some positive rule of law. There is no such compulsion to be found in the city charter of Boston or in the general laws of the Commonwealth. The appropriation of money for a specific purpose by the legislative department of the city of Boston does not make its expenditure mandatory on the executive officers in a case like the present. There is no provision of law which overrides the discretion exercised by the single justice.

It is not necessary to consider the numerous other grounds for refusing the writ urged by the respondent.

Petition dismissed.

The case was submitted on briefs.

R. J. Cram, for the petitioner.

J. J. Corbett, for the respondent.

RICHARD W. HALE *vs.* GEORGE P. BOWLER & others.

OLD COLONY TRUST COMPANY *vs.* SAME.

ANGELINA G. STEVENS *vs.* SAME.

Suffolk. May 19, 1913. — June 18, 1913.

Present: RUGG, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Trust, Restriction of income. *Equity Jurisdiction,* To reach and apply equitable assets.

A trust created for the benefit of a spendthrift provided that the income from the fund in question should be paid to the spendthrift during his lifetime, but

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without power of alienation and not subject to interference or control by creditors. This trust was created upon the withdrawal by the spendthrift of his opposition to the allowance of a certain will, but his opposition thus withdrawn had not been made in good faith and was merely an attempt to extort a settlement for his benefit. *Held*, that the abandonment by the spendthrift of his dishonest opposition to the allowance of the will gave him no rights whatever and could furnish no valid consideration for any promise or payment to him or for his benefit; that he took merely the qualified interest that the donor chose to give him, with no power over the income of the trust until it came into his possession, and that neither his creditors nor his assignees could have any greater rights than he had himself.

THREE BILLS IN EQUITY, filed in the Supreme Judicial Court, the first two on October 18, 1911, and the third, as amended, on March 30, 1909, each of the first two bills being brought by a trustee under an alleged spendthrift trust for the benefit of the defendant George Pendleton Bowler, for instructions, and the third bill being brought by a creditor of the defendant George Pendleton Bowler, who held instruments purporting to be assignments of the income of such trusts and sought to reach and apply such income to the payment of the debt due to her from that defendant.

The first two cases were referred to Franklin T. Hammond, Esquire, as master, and the third case was referred to James D. Colt, Esquire, as master.

At the request of the parties the three cases were reserved together by *De Courcy*, J., for determination by the full court, the questions raised and the facts necessary for their determination being stated in the opinion.

The cases were submitted on briefs.

R. D. Weston, for the plaintiffs in the first two cases and for the defendants Hale and the Old Colony Trust Company in the third case, contending for the validity of the spendthrift trusts.

A. N. Hand (of New York), for Robert P. Bowler.

F. E. Bradbury & C. A. Barnes, for M. Colby Little, one of the defendants in the first two cases, and for Angelina G. Stevens, the plaintiff in the third case and one of the defendants in the first two cases.

No brief was filed for the defendant George P. Bowler.

SHELDON, J. Each one of these cases depends upon the question whether the trust funds mentioned in the first two cases respectively are held upon valid spendthrift trusts in favor of George P. Bowler, so that the income could not be disposed of or alienated

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by him, and could not be attached at law or reached in equity by his creditors, before it should be received by himself. This again, as to each one of the trusts under consideration, depends upon whether that trust was created by himself out of his own property or whether it was created by another out of property in which George at the creation of the trust had no interest, and acquired no interest other than the strictly limited one created by the terms of the trust instrument. This is the rule which was settled in this Commonwealth by the leading cases of *Broadway National Bank* v. *Adams*, 133 Mass. 170; *Pacific National Bank* v. *Windram*, 133 Mass. 175; and the cases collected by Loring, J., in *Lathrop* v. *Merrill*, 207 Mass. 6, 9.

The property included in the "Cincinnati trust" so called, which is the subject of the first suit, was conveyed by George P. Bowler to Hale, the plaintiff in that suit, in trust to pay the income thereof during the life of George to his mother, and after her death to such person or persons as she might by will appoint. There were equitable remainders after the death of George, which are not now material. This transfer, it has been found, was executed by George in good faith while he was solvent, was not upon any trust for his benefit, and was valid against any creditors of his or any others subsequently claiming under him. His mother died, leaving a will by which she appointed the income to her son Robert, and purposely omitted to make any provision for George. George contested the probate of this will; but his contest was not made in good faith or with any honest belief that it was well founded. On the contrary he made the contest with no expectation of success, but solely for the purpose of forcing a settlement from his brother Robert. Thereupon Robert, after some negotiations, though denying the validity of any of George's claims or the existence of any ground for opposing the probate of the will, paid a sum of money to George; provided that the income of the "Cincinnati trust" should be paid to George during his lifetime, but without its being liable to interference or control by his creditors and without power of alienation thereof; and also established the trust which is the subject of the second suit, by paying the amount thereof to the Old Colony Trust Company, upon trusts as to the income substantially the same as already stated, with equitable remainders after the death of George, which likewise are not now material.

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Upon these facts, it is impossible to say that the trusts were in any sense created by George or out of money or property in which he had an interest. The spendthrift provisions were not created or suggested by him; they were proposed and insisted upon by Robert. It sufficiently appears that these provisions were reluctantly assented to by George, only because he could extort no other terms from Robert. Robert on his side was merely substituting this method of supporting his wasteful and profligate brother for the more troublesome method of doling out to him from time to time such assistance as he, Robert, should see fit to provide. The withdrawal of George's dishonest opposition to the probate of his mother's will furnished no legal consideration for any promise or payment to him or for his benefit. It was merely a blackmailing contest, and its abandonment gave to him no rights whatever. *Silver* v. *Graves*, 210 Mass. 26, 30. George took upon abandoning this illusory contest simply what his brother chose to give him; and this, as in *Billings* v. *Marsh*, 153 Mass. 311, and *Nickerson* v. *Van Horn*, 181 Mass. 562, 563, was not an absolute interest in the income of these funds, but merely a qualified interest, with no power over it until it should come into his possession. It is not in his control in the meantime; it has not yet become his property for purposes of disposition; and neither his creditors nor his assignees can have any greater rights in it than he himself has acquired.

It is not suggested that there are here any contingent remainders in which George can be said to have a vested interest, such as were found to exist and were made available to creditors in *Alexander* v. *McPeck*, 189 Mass. 34; *Huntress* v. *Allen*, 195 Mass. 226; and *Clarke* v. *Fay*, 205 Mass. 228.

The result is that in each of the first two cases the plaintiff must be instructed that the spendthrift provisions of the trust are valid. In the third case, the plaintiff cannot hold the property which she seeks to subject to the payment of her alleged demands; and accordingly her bill must be dismissed with costs (*Hoshor-Platt Co.* v. *Miller*, 190 Mass. 285; *Brown* v. *Floersheim Mercantile Co.* 206 Mass. 373, 377), but without prejudice to an action at law against the defendant George P. Bowler.

So ordered.

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JOSEPH A. HURD *vs.* GENERAL ELECTRIC COMPANY.

Essex. May 22, 1913. — June 18, 1913.

Present: RUGG, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON & DE COURCY, JJ.

Equity Pleading and Practice, Appeal. *Way,* Private. *Deed,* Construction.

On an appeal to this court from a final decree dismissing a bill in equity, where a memorandum made by the trial judge was before this court, in which after stating his findings of the material facts he stated that he drew a certain inference as to the intention of the parties to a certain deed in which the description of a right of way was ambiguous, it was assumed for the purposes of decision, that the inference was drawn by the judge from the facts found by him and was not a finding of fact upon conflicting oral evidence; so that, in considering whether the inference was to be drawn, this court stood in the same relation to the question as the judge who heard the case.

Upon the question, whether a right of way defined in a deed by ambiguous words was over a proposed private street only so far as such street should adjoin the land conveyed or whether the easement extended over a prolongation of the proposed street upon other land of the grantor, the acts of a subsequent owner of such other land more than eight years after the making of the deed to be interpreted have no bearing on the meaning of the doubtful language of that deed.

The owner of a tract of land on the outskirts of a city conveyed a parcel of such land bounded northerly by a highway and "westerly on a proposed street to be laid out fifty feet wide one hundred and eighty feet . . . with a right of way over said proposed street." No plan or other deed was referred to to identify the proposed street or way. In a suit in equity the question was raised, whether the right of way granted was only over a street fifty feet wide adjoining for one hundred and eighty feet the land conveyed or whether it extended to a prolongation of such a street upon the land of the grantor as shown on a plan caused to be recorded many years later by a subsequent owner of such other land. It appeared that when the deed was given the only street in the immediate neighborhood was the highway by which the northerly side of the lot was bounded, that on the lot was a dwelling house facing on such highway, that at the southerly end of this lot close to the westerly line was a pickle factory, and that the only means of reaching this was by a way over land of the grantor adjoining the westerly line of the granted premises, that eight years earlier the grantor had planned with his brother the creation of a street, which was described in mutual deeds, beginning where the right of way began, but that five years before the giving of the deed in question the grantor had acquired his brother's land and had abandoned the plan, that he had built partly within the limits of such formerly projected street a substantial building, with a brick cellar and stone foundations, and also a shed and two other structures, and beyond these had set out on the formerly projected street an orchard with pear and other fruit trees. *Held,* that from these facts it was to be inferred that

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at the date of the deed there did not exist in the contemplation of the grantor or the grantee any other or longer proposed street than such as would adjoin the granted premises.

BILL IN EQUITY, filed in the Superior Court on October 31, 1911, by the owner of a parcel of land at the corner of West Neptune Street and a private way called Pitkin Street in Lynn, to establish a right of way in an alleged part of Pitkin Street extending southerly beyond the plaintiff's land as well as in the part of Pitkin Street adjoining the plaintiff's land.

The case was heard by *Pierce*, J. He filed a memorandum of findings, containing the facts which are stated in the opinion. The deed there mentioned of Gustavus A. Fairchild to George E. Curtis and Frank Curtis, the plaintiff's predecessors in title, was dated July 27, 1881, and conveyed "that certain parcel of land with the buildings thereon standing situate in said Lynn and bounded and described as follows viz: northerly by West Neptune Street ninety-five feet, easterly by land of George P. Goss one hundred and fifty-eight feet southerly by land of the grantor ninety-five feet and westerly on a proposed street to be laid out fifty feet wide one hundred and eighty feet be all of said measurements more or less, with a right of way over said proposed street."

The findings of the judge contained, among other matters which are mentioned in the opinion, the following: "I draw the inference and therefore find that at the date of the conveyance to the Curtises there did not exist in the contemplation of the grantor or grantees any other or different proposed street than such as lay adjacent to the granted premises."

The land on which the plaintiff claimed the right of way was owned by the defendant, which had constructed a building and a railroad track over portions of the alleged Pitkin Street and proposed, unless restrained by the court, to erect a large structure covering the alleged Pitkin Street to a point farther north than that already occupied but south of and not adjacent to the plaintiff's land.

The judge made a final decree that the bill be dismissed with costs to the defendant; and the plaintiff appealed.

The case first was argued on January 6, 1913, before *Rugg*, C. J., *Morton*, *Braley*, & *Sheldon*, JJ. The case was argued again at a special sitting of the court on May 22, 1913, before *Rugg*, C. J.,

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Hammond, Loring, Sheldon, & *De Courcy,* JJ., and afterwards was submitted on briefs to all the justices.

S. L. Whipple, (*A. Lincoln* with him,) for the plaintiff.

W. H. Niles & R. P. Clapp, for the defendant.

RUGG, C. J. This is a bill in equity by which the plaintiff seeks to establish a right of way over Pitkin Street, so called, in the city of Lynn as appurtenant to a lot of land owned by him. The plaintiff is the successor in title to George E. and Frank Curtis, and his alleged right of way depends upon the construction of a deed to them dated July 27, 1881, from Gustavus A. Fairchild, who was then owner of a tract of land including that under and adjacent on both sides to what is now Pitkin Street. That deed described by lengths of line the other boundaries of the lot, and concluded with these words: — "Westerly on a proposed street to be laid out fifty feet wide one hundred and eighty feet be all of said measurements more or less, with a right of way over said proposed street." The westerly boundary line of the lot conveyed was one hundred and eighty feet in length. The deed contained no reference to any plan nor to other deeds or instruments by which the "proposed street" or the "right of way over" may be identified. The case was tried before a judge of the Superior Court, who found all the material facts, and then drew "the inference and therefore" found "that at the date of the conveyance to the Curtises there did not exist in the contemplation of the grantor or grantee any other or different proposed street than such as lay adjacent to the granted premises."

It has been argued that this finding of intention on the part of Gustavus A. Fairchild at the time of the Curtis deed stands as a finding of fact which under the familiar rule is not to be reversed unless plainly wrong. There is force in this contention. But for the purposes of this decision it is assumed in favor of the plaintiff that this inference was one drawn by the trial judge from the facts found by him and not one made by him upon conflicting evidence oral in whole or in part, and hence that the appellate court stands in the same place as the judge who heard the case. *Harvey-Watts Co.* v. *Worcester Umbrella Co.* 193 Mass. 138, 143.

The facts to be considered are those substantially contemporaneous with or previous to the Curtis deed, which contains the language to be construed. The acts of Henry Fairchild eight and

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more years after the date of the Curtis deed throw no light upon the intent of the parties to that deed in using the words "proposed street to be laid out fifty feet wide," for several reasons. He was not a party to the Curtis deed. His acts are so far subsequent and are so disconnected with that deed as to forbid the inference that they had relation to it as parts of the same transaction or were made in explanation or characterization of it. They have no tendency to show a practical construction of that deed by the parties, both because of the remoteness of time and because the ownership of both tracts had changed in the meantime. Such conduct affords no aid in ascertaining the meaning and intention of the parties to the Curtis deed. Acts of a later owner, long after the deed to be construed, with a purpose which may have been far different, shed no light upon the interpretation of doubtful language in that deed. *Rogers* v. *Powers*, 204 Mass. 257, 264.

No contention is made that the facts found by the judge are not supported by the evidence. No other conclusions than those reached by him as to the extraneous facts seem possible on the record. The precise question is whether on these facts the words "proposed street" as used in the Curtis deed from Gustavus A. Fairchild in 1881 mean the Pitkin Street shown on a plan caused to be recorded by his brother Henry who was his successor in title in 1892 eleven years afterwards. The meaning of these words in the Curtis deed is for the court, but all the material facts existing at the time concerning the subject matter may be considered for the purpose of ascertaining the sense in which the language was used. It is important for the court so far as possible to place itself in the position of the parties at the time when the words were chosen with all the knowledge of attendant circumstances in their possession, and then to determine the natural and probable signification which reasonable persons would have attached to this language. The situation in 1881, when the Curtis deed was made, was this: — The only street in the immediate neighborhood was West Neptune Street, by which alone main thoroughfares of travel could be reached from the lot conveyed to the Curtises. There was built upon the granted premises a dwelling house which faced on West Neptune Street, and in the rear reaching almost to its southerly line a con-

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siderable building called the pickle factory, of which the Curtises were lessees and which they had used for making pickles. This building was close to the westerly line of the lot and the only access to it was by a way from West Neptune Street which Gustavus A. Fairchild had constructed and extended for the purpose of reaching it over land adjacent to the westerly line of the granted premises.

Viewed from the standpoint of the grantees, it is difficult to think that they could have contemplated as a "proposed street to be laid out fifty feet wide" anything more than one coterminous with their western boundary line. They were ignorant of the scheme for a street thereafter to be constructed projected eight years before between Gustavus A. Fairchild and his brother Henry, which had never materialized and which had been wiped out by a deed from Henry to Gustavus in 1878. The only way they needed for the full and complete enjoyment of the land and buildings they were buying was one which would enable them to reach the building at the rear of their lot from West Neptune Street. Looking southerly over what is now Pitkin Street, they would have seen permanent buildings, a flourishing young orchard and marshes but no public or private ways. There were no buildings in that general direction, but only marshes. A street over that locus would have seemed unlikely and useless. As found by the judge, over such a way as this there could be no reason to suppose that the occupants of the Curtis premises would ever have occasion to go, and the presence or absence of a way south of the wash-house seemingly could have added nothing to nor taken anything away from the usefulness or value of the premises.

Treating the situation from the position of the grantor, it appears that eight years before he and his brother had projected a division of this plot of land by a street. They had described this project in mutual deeds which were recorded, but it had remained an unaccomplished plan, toward which nothing had been done either on the face of the earth or on paper or otherwise for five years, when it had been abandoned and wiped out of existence by a warranty deed from the grantor's brother to the grantor, so that he was the owner in fee and had been for three years. The land was free from all obligation as to a way. Immediately upon acquiring absolute title he had built partly within the limits of this imaginary

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street a substantial building with a cellar of brick and stone foundations, called the wash-house, of ample dimensions, to be used in connection with the business of market gardening which he had established. He had also built a shed, a large hot-house and a cold frame house all encroaching upon this old projected street. The expense of these buildings must have been considerable. Then beyond that, also on the old projected street, he had set out an orchard of pear and other fruit trees. It would be difficult to conceive of acts disclosing more conclusively than these a fixed purpose for the permanent appropriation of the land. The construction of substantial buildings having definite and enduring use in connection with a necessary business is significant. The planting of an orchard of fruit trees is far more indicative of unwavering intention than most other acts of proprietorship. Several years are ordinarily required for any fruitage and a period of many years for full fruition. In the conduct of a husbandman scarcely anything shows a more deliberate and settled determination to devote land for a long time to a particular use to the exclusion of all others than the setting out of an orchard of pear and other fruit trees. It is almost inconceivable that a farmer, who had recently entered upon the enjoyment of full ownership of a tract of land and had erected these new buildings for agricultural uses and set out his young orchard, should contemplate at the same moment their entire destruction by a "proposed street" to be constructed within a reasonable time. Such an idea cannot be inferred in the absence of compelling considerations.

It is urged in behalf of the plaintiff that such considerations may be found in the fact that in 1873 the grantor and his brother had designed a street over what is now Pitkin Street fifty feet in width and that this was peculiarly within the knowledge of the grantor. If Gustavus A. Fairchild had intended this street when he made the Curtis deed it would have been natural for him to refer to the deed of 1873 which presumably was in his possession and by which the street could have been located. But passing this, as has been seen, that design was wiped out of existence by the deed from Henry to Gustavus in 1878. Slight significance is to be attached to the use of the word street rather than road or way in the Curtis deed. Farmers living within the limits of a city well might use these words indifferently. Nor is the width of

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fifty feet of much consequence. This is a convenient width for any kind of way, especially where as here there was no passage through and teams which drove in must have room to turn around in. There is ample scope for an interpretation of the words "proposed street to be laid out fifty feet wide" which would seem within the reasonable contemplation of the parties at the time they were used. Some way over land of the grantor was needed by the grantees to reach their pickle-house, and this was all they required. A like way was needed by the grantor to reach his own wash-house and other buildings. A way of substantially the same length as and adjacent to the westerly line of the granted premises would satisfy both these necessities. A way like the present Pitkin Street would have seemed chimerical. There is nothing to indicate that Gustavus as owner of the entire tract ever contemplated a street extending southerly substantially beyond the southerly boundary line of the plaintiff's lot. He never used any such way, and neither he nor his heirs ever built one nor did any other act disclosing the thought of such a street. It was not until nine years after his death and nineteen years after the original idea of a street that a successor in title constructed a street which, although coincident with the street proposed in 1873 at one end, was almost fifty feet farther west at the other end. This in the opinion of a majority of the court falls far short of proving that Gustavus A. Fairchild had in mind any such street when he used the words "proposed street to be laid out fifty feet wide" in the Curtis deed, or that the Curtises had the slightest reason to suppose that they were used in that sense. The inference drawn by the judge of the Superior Court, that "at the date of the conveyance to the Curtises there did not exist in the contemplation of the grantor or grantees any other or different proposed street than such as lay adjacent to the granted premises," was right.

If it be assumed that the questions of evidence are before us properly, no error is shown. The plan of other land, acquired by Gustavus A. Fairchild from a different source than the plot of which the Curtis land was a part, had no bearing upon the construction of the Curtis deed and was excluded rightly as having no connection with the proposed way. *Gould* v. *Wagner*, 196 Mass. 270, 276. No reversible error appears on this record.

Decree affirmed with costs.

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CHANDLER AND COMPANY, INCORPORATED, *vs.* McDONALD-WEBER COMPANY & another.

SAME *vs.* E. T. SLATTERY COMPANY & another.

Suffolk. May 22, 1913. — June 18, 1913.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DE COURCY, JJ.

Contract, Construction.

If the general lessee of an entire building makes an "option agreement" in writing with a sublessee of one floor of the building, that if the general lessee decides to sell his leasehold interest he will notify such sublessee and will give to the sublessee "an opportunity to purchase said leasehold estate, and upon the terms and conditions as fixed by" the general lessee, such general lessee fulfils his obligation to the sublessee by offering in good faith to sell his leasehold interest to the sublessee on specified terms and conditions without having fixed the terms and conditions in any actual or pending bargain with a third person.

TWO BILLS IN EQUITY, filed in the Supreme Judicial Court, the first on August 7, 1912, and the second, as amended, on February 17, 1913, between the same parties, both bills seeking to enforce the alleged terms of an agreement in writing between the defendant McDonald-Weber Company and the plaintiff dated March 13, 1909, and to restrain that defendant from selling to the defendant E. T. Slattery Company or any other person or corporation the leasehold interests mentioned in such agreement contrary to the terms of the agreement as set forth in the bills.

The contract above referred to, which was called in the evidence at the hearing the "option agreement," was as follows:

"Memorandum of agreement made this day between the McDonald-Weber Company, a corporation duly organized and established under the laws of the State of Maine, party of the first part, and Chandler & Company, Incorporated a corporation duly organized and established under the laws of the Commonwealth of Massachusetts, party of the second part.

"Witnesseth that the party of the first part, in consideration of certain mutual promises of the party of the second part, for it-

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self, its successors and assigns, hereby agrees with the party of the second part, its successors and assigns, as follows:

"That if at any time during the tenancy of the party of the second part in the premises 156–156A Tremont Street, Boston, the party of the first part decides to sell its leasehold interests in said 156–156A Tremont Street, it will first notify the party of the second part, and give it an opportunity to purchase said leasehold estate, and upon the terms and conditions as fixed by the party of the first part. The party of the second part, within ten (10) days after the submission by the party of the first part to it of the terms and conditions of sale, must either accept or reject the said terms and conditions.

"It is mutually agreed between the parties hereto that should the said party of the second part reject said terms, the party of the first part is thereafter under no obligations to the party of the second part by virtue of this agreement, and further, that nothing herein contained shall be construed as granting to the party of the second part any present vested or contingent interest in the leasehold estate.

"In witness whereof the said parties have caused their several corporate seals to be hereto affixed, and their names to be signed by their respective officers, all thereunto duly authorized, this 13th day of March, 1909."

Demurrers to the bills were overruled by interlocutory decrees, from which the defendants appealed. The cases then were consolidated by order of court for trial and were heard by *Braley*, J., who made certain findings of fact, of which those that are essential are stated in the opinion. At the request of the parties, the justice reserved the cases upon the pleadings, the demurrers, the decrees overruling the demurrers, the evidence, and the findings of fact, for determination by the full court.

The cases were submitted on briefs.

R. B. Stone, for the plaintiff.

J. F. Cusick, for the McDonald-Weber Company.

G. A. Sweetser, for the E. T. Slattery Company.

SHELDON, J. The rights of these parties depend upon the "option agreement" so called, given by the McDonald-Weber Company (hereinafter called the defendant) to the plaintiff contemporaneously with the lease of one floor of a building on Tremont

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Street in Boston. The defendant, which had a leasehold interest in the whole building, covenanted by the "option agreement" that if the defendant decided to sell its leasehold interest it would notify the plaintiff and would give it "an opportunity to purchase said leasehold estate, and upon the terms and conditions as fixed by" the defendant.

The plaintiff contends that by the true construction of this agreement the defendant's decision to sell and the fixing of the terms and conditions of sale could be accomplished only by and in the course of the making by the defendant of a definite bargain with some third person. The defendant contends that by the agreement it was merely bound, if it decided to sell, to notify the plaintiff of such decision, and to give the plaintiff an opportunity to buy upon such terms and conditions as should be fixed by the defendant, and that such notice and offer made in good faith would fulfil all the obligations of the defendant. In our opinion, the latter contention is correct.

The natural meaning of the words used accords with the construction urged by the defendant. The terms and conditions upon which the plaintiff was to have the option of purchasing were not such as might be determined by an independent agreement to be concluded between the defendant and a third party, but such as might be fixed by the defendant itself. We have no right to add to this provision the further stipulation that the defendant must have found some other purchaser who had accepted or even who was willing to accept the terms which it had fixed. *Fogg* v. *Price*, 145 Mass. 513, 515.

The plaintiff contends that upon this construction the agreement is merely illusory. That may be doubted. It secured or purported to secure to the plaintiff a right which might be valuable, the right to have the premises first offered to it, upon stated terms, which must of course be fixed in good faith and not as a mere device to get rid of the plaintiff. But however that may be, we cannot give to the plaintiff any greater rights than it chose to provide for by its contract.

The construction urged by the plaintiff would require the defendant, if it desired to sell its leasehold interest, first to find a purchaser thereof and to conclude with him a definite and complete bargain, all the terms and conditions of which should be

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fixed by agreement with him, and then to offer the premises to the plaintiff upon the same terms and conditions, and to wait ten days for the plaintiff to make up its mind, before it could be known whether the concluded agreement between the defendant and the proposed purchaser could be carried into execution. A merely tentative or provisional agreement not binding upon a proposed purchaser would not be enough, if we adopt the full contention of the plaintiff; for the terms and conditions could not be said to have been fixed if they had not been made binding upon both the parties to the prospective sale. But it is manifest that such an agreement, depending for the vendor's ability to carry it out upon the unforeseeable contingency of the plaintiff's choice, would at best be difficult of conclusion, and very likely would be practically impossible. We cannot suppose that the parties intended that the defendant should be thus tightly fettered in making a sale which was at least contemplated as possible, unless their language shows this intention. No doubt the defendant might have made such an agreement; but this is not lightly to be presumed.

The defendant did not even agree, as in *Hayes* v. *O'Brien*, 149 Ill. 403, a case much relied on by the plaintiff, to sell to the plaintiff for such price as any other person might offer, a much less onerous stipulation than what is insisted upon here. That decision does not help the plaintiff. The case at bar more nearly resembles *Folsom* v. *Harr*, 218 Ill. 369, though the facts are not exactly the same as were there presented.

According to the findings of the single justice, the defendant having decided to sell, notified the plaintiff thereof, and soon afterwards made a written proposition of sale to the plaintiff, upon terms therein stated. This proposition the defendant made in good faith for the purpose of complying with the terms of the "option agreement," and both parties so understood it. The plaintiff had a full opportunity to buy, but declined to do so at the price offered by the defendant. These findings were fully warranted by the evidence reported. It follows that the defendant has performed its agreement, and the plaintiff has no ground of complaint.

The plaintiff acquired by the "option agreement" no legal or equitable estate in the leasehold. *Emerson* v. *Somerville*, 166 Mass. 115.

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It is not necessary to consider the appeals from the interlocutory decrees overruling the demurrers. Each of the bills must be dismissed with costs.

So ordered.

LYMAN P. THOMAS *vs.* COMMONWEALTH & others, HENRY J. GREEN, intervening petitioner.

Suffolk. May 23, 1913. — June 18, 1913.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Commonwealth. Lien, Under R. L. c. 6, § 77. *Equity Jurisdiction,* To enforce liens under R. L. c. 6, § 77.

Liens against funds retained by the Commonwealth under a contract for the construction of a State highway cannot be established as for labor or materials "used in such construction" within the meaning of R. L. c. 6, § 77, upon claims for boards used for concrete forms and for conduits, upon claims for netting, cotton line, or for use of rules, road scraper or scales, for buggies used in transporting help, for money paid for freight, or for coal for the steam roller; nor can such a lien be established upon a claim for hauling stone from various stone walls in the vicinity of the highway to the crusher and for hauling cracked stone from the crusher to the road.

BILL IN EQUITY, filed in the Superior Court on March 3, 1905, to establish and enforce a claim under R. L. c. 6, § 77, upon certain funds retained by the Commonwealth under a contract for the construction of a State highway.

On February 19, 1909, Henry J. Green was permitted to file a similar claim as an intervening claimant.

The case was referred to Henry T. Richardson, Esquire, as master. The case was heard upon the master's report by *Hardy,* J., who made a memorandum of decision as follows:

"On the basis for settling a decree in this bill I make the following allowances, namely: Claims for stone actually used on the highway; claims for gravel used in the construction of the highway; claim for labor in feeding stone crusher; claim for labor levelling stone; claim for cement used in construction of highway; claim for drainpipe used in construction of highway.

"I disallow the following claims, namely: Claims for hauling stone to crusher and to portions of highway; claims for teaming,

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purpose not in evidence; claims for boards used for concrete forms; claims for boards for conduit; claim for coal furnished for steam roller; claim for netting used in construction of highway; claim for cotton line; claim for rules; claim for road scraper; claim for buggies in transporting help; claim for use of scales; claim for freight paid."

A final decree based on these allowances and disallowances was made by the judge, from which the plaintiff Thomas and the intervening claimant Green appealed.

The case was submitted on briefs.

J. H. Vahey & P. Mansfield, for the plaintiff.

J. W. Worthington, for the defendant Pacific Surety Company.

G. H. Wyman & F. L. Brier, for the intervening petitioner.

HAMMOND, J. This case is before us upon the respective appeals of the plaintiff Thomas and the intervening creditor Green from a final decree in which certain items in the account of Thomas and the whole account of Green were disallowed.

The particulars relating to the claims disallowed are set forth in the report of the master and need not be repeated. It is clear upon the report that the items for boards used for concrete forms and for conduits, for netting, cotton line, rules, road scraper, buggies used in transporting help, use of scales, freight money paid, and for coal for the steam roller, were all properly disallowed, the last under the principle enunciated in *George H. Sampson Co.* v. *Commonwealth,* 202 Mass. 326, 337, 338, and the others upon the principle of *Kennedy* v. *Commonwealth,* 182 Mass. 480.

The claim of Green is entirely for teams used for "hauling stone from various stone walls in the vicinity of the highway to the crusher and for hauling cracked stone on to the road from the crusher." We think that this claim cannot be logically distinguished from the claim for hauling lumber and sand in *Webster* v. *Real Estate Improvement Co.* 140 Mass. 526, and therefore it was properly disallowed. And so of similar items in the account of Thomas. There is nothing in *Friedman* v. *County of Hampden,* 204 Mass. 494, inconsistent with the result herein reached. Of course the items for teaming for purposes not shown in evidence were properly disallowed. Indeed we do not understand that either of the appellants contends to the contrary.

Decree affirmed.

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SALISBURY LAND AND IMPROVEMENT COMPANY *vs.* COMMONWEALTH.

Essex. March 25, 1913. — June 19, 1913.

Present: RUGG, C. J., MORTON, LORING, SHELDON, & DE COURCY, JJ.

Constitutional Law, Eminent domain, Police power. *Salisbury Beach Reservation.*

St. 1912, c. 715, purporting by § 4 to authorize the Salisbury Beach Reservation Commission to take by right of eminent domain as a public reservation any or all of the land or of the rights in any land in a described portion of the town of Salisbury bounding on the Atlantic Ocean and the Merrimac River, which included when the act was passed an existing seaside resort equipped with cottages and other appurtenances, and providing in § 10 that "Said commission may sell or lease any lands or rights in land taken or acquired by it, which are not needed as a public reservation," with other provisions contemplating the taking, not only of the seashore and other lands purely for reservation purposes, but also other real estate in the designated territory to be sold or leased to private persons, is unconstitutional as an attempt to authorize the exercise of the right of eminent domain in part for a private purpose, and because it is impossible to separate the valid from the invalid portions of the statute.

The interest of the public that the people should be well housed, although proper to be considered in the exercise of the police power, is not a proper subject for the exercise of the right of eminent domain. By RUGG, C. J.

PETITION, filed in the Land Court on January 12, 1911, by the Salisbury Land and Improvement Company, and amended by leave of court on July 13, 1912, by the substitution as petitioners of the trustees of the Salisbury Beach Associates and other persons who after the filing of the petition had acquired the title of the original petitioner, for the registration of title to certain land at Salisbury Beach in Salisbury notwithstanding an attempted taking of such land by the Salisbury Beach Reservation Commission under St. 1912, c. 715, which was alleged by the substituted petitioners to be unconstitutional.

The case was heard by *Davis*, J., who found the facts which are stated in the opinion, and ruled *pro forma* that the statute in question was constitutional and the taking valid. He ordered that a decree be entered dismissing the petition for registration

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of title as to all land covered by such alleged taking, and at the request of the parties reported the case for determination by this court. If the order of the judge was right, the decree was to be entered as ordered; otherwise, the case was to be remanded to the Land Court for such further proceedings as this court might direct.

H. I. Bartlett, (*W. Coulson* with him,) for the Salisbury Beach Associates.

J. M. Swift, Attorney General, *& E. S. Abbott*, for the Commonwealth, submitted a brief.

RUGG, C. J. The question presented is the constitutionality of St. 1912, c. 715, entitled "An Act to make Salisbury Beach a public reservation and to establish the Salisbury Beach Reservation Commission." Its several sections provide for the appointment of a commission and the machinery by which land may be taken, money raised and a public reservation managed. The ground of attack upon its validity is that it authorizes the taking of land for a private rather than a public use. In order to pass intelligently upon its constitutionality in this respect the physical facts to which it is applicable may be considered to ascertain what may be its practical operation. The property which may be taken under the statute is known as Salisbury Beach and consists of sand dunes and beach in the town of Salisbury extending from the New Hampshire line about three and one half miles by the sea to the mouth of the Merrimac River. A street railway has been constructed along the length of the beach. On the ocean side there are cottages for summer occupancy and on the westerly line of the dunes a large number of houses have been built, and hotels, shops, boarding houses, places of amusement and other buildings have been constructed and a summer community has been established, with a system of water and gas pipes, electric lights, sewers and telephones, all of which, including the street railway, were leased by the petitioner or its predecessors in title. Streets were laid out or provided for by agreement with the town, plans were drawn showing the property divided into house lots and many lots were leased to cottage owners and others. The property was owned by the Commoners of Salisbury until 1903, when it passed into private ownership, and finally has come to the petitioner. Since the acquirement of the property by the petitioner many leases have expired and they

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have not generally been renewed except in a few instances and at a substantial increase in rent.

The material portions of the act are printed in a footnote.*

It is a familiar principle of constitutional law that every presumption is made in favor of the validity of a statute. It is not to be held a violation of the fundamental charter established by the people in their constitution unless so clearly outside the power conferred upon the Legislature as to be free from reasonable doubt in that regard. It must be assumed that the Legislature intended to act within its lawful bounds and this assumption cannot be overthrown unless the statute unmistakably oversteps these bounds by manifest and plain terms. On the other hand when it is clear that the statute transgresses the authority vested in the Legislature by the Constitution, it is the duty of the court, a duty from which they cannot shrink without profaning their oaths of office, to see and to declare the invalidity of the statute. The judicial department of government cannot surrender its judgment respecting the validity of statutes to that of either of the other departments and when the occasion arises must refuse to enforce a statute which does not conform to the requirements of the fundamental law of the land. The statute must be

* Section 4 authorizes the commission "to acquire in fee, by purchase, gift or by right of eminent domain, in the name of the Commonwealth, and thereafter to maintain and make available for the inhabitants of the Commonwealth as a public reservation for the use, exercise and recreation of the inhabitants of the Commonwealth, any or all of the land or any or all of the rights in any land in" a specific portion of the town of Salisbury bounding on the Atlantic Ocean and Merrimac River.

"Section 10. Said commission may sell or lease any lands or rights in land taken or acquired by it, which are not needed as a public reservation for the use, exercise and recreation of the inhabitants of the Commonwealth, with or without restrictions as to its use as it may deem advisable, and may make sales of the grass, sand, and other materials in said reservation. The town of Salisbury shall levy, assess, and collect a tax on all buildings and personal estate in said reservation not owned by the Commonwealth in the same manner as if the said reservation had not been created, and shall collect a tax on all land in said reservation not taken, acquired or used by said commission for the purposes of this act.

"Section 11. The town of Salisbury shall have the general charge and supervision of the education of the children resident in the reservation as in the case of other children resident in the said town."

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construed as a whole. That which, by fair intendment, its terms may confer power to accomplish, must be ascertained by a broad consideration of the entire act, bearing constantly in mind the presumption in favor of its validity.

The establishment and maintenance of public parks and reservations out of moneys raised by taxation and the exercise of the power of eminent domain for their acquirement plainly are within the power of the Legislature. It requires no discussion to demonstrate that this is a public purpose. Nor can it be contended reasonably in view of many of our decisions that the taking of the fee rather than an easement in land to this end is not permissible. *Higginson* v. *Treasurer & School House Commissioners of Boston*, 212 Mass. 583 and cases cited at 591. The acquirement of beaches by eminent domain and at the public expense for bathing and other purposes of general utility has never been questioned in this Commonwealth. That it is a legitimate exercise of the sovereign power is not open to doubt. See *In re Metropolitan Park Commissioners, petitioners*, 209 Mass. 381. Looking alone at § 4 of the act now under consideration, the power conferred does not appear to go beyond the right of acquiring and maintaining land and rights in land for a public park or reservation. But this section must be read in connection with other sections in order to understand the full scope of the act. Section 10 authorizes the commission to "sell or lease any lands or rights in land taken . . . by it, which are not needed as a public reservation." These words are not restricted as to time. They form a part of the original act and are operative contemporaneously with all its other provisions. There is nothing to require a determination that by reason of changed conditions land deemed necessary at the time of taking, has become no longer needed. These words in connection with § 4 undertake to enable the commission to take "any or all of the land" within the designated area and at the same moment to determine that some of the lands thus taken "are not needed" and immediately to proceed to "sell or lease" such lands. Thus there may be an adjudication that lands are needed for the public use which involves a payment for them out of moneys raised by taxation, coupled with a determination not to devote some of these lands to the enjoyment of the people at large but to sell or lease them for private occupation.

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There are no words in this or the other sections which limit this broad power. It is not stated expressly or by implication that such sales or leases can be only of property once needed and used for the public resort but which through changed conditions have become useless therefor, nor confining the right to trifling and almost negligible remnants of estates which would be unsuitable for private use after the part actually needed for public use has been appropriated. That this wide power of taking for private use was intended by the present act is confirmed by reference to the latter part of §10 to the effect that the town of Salisbury may tax "all buildings and personal estate in said reservation not owned by the Commonwealth . . . and shall collect a tax on all land in said reservation not taken, acquired or used by said commission for the purposes of this act." The first part of this sentence seems to contemplate that buildings and personal property shall be and remain in private ownership upon the reservation to such an extent as to be substantial subjects of taxation, while the final clause appears to provide for the taking and holding by the commission of substantial areas of land not for the public purposes set forth in the act. No land can be "in said reservation" until taken or acquired by the commission under the authority of the act. The evident design of § 11 is that upon the reservation shall be such a considerable settlement of inhabitants that special provision was thought to be needed for the education of the children in the public schools of Salisbury. This would be impossible if a reservation of this size were devoted wholly to the public. Whatever may be said of the force of any one of these several provisions standing alone, taken in conjunction and construed together they authorize the taking not only of the seashore and other lands purely for reservation purposes but also of other tracts in the designated territory to be sold or leased to private individuals, or held without appropriation to the use of the public, which means inferentially a holding for private uses. When applied to the subject matter, namely, an existing summer resort with all its equipment of cottages and other appurtenances, it is difficult to say which of these two is the dominant aim.

The construction put by the commission upon the powers conferred by the act as revealed by their conduct is in accordance with this interpretation. It merely indicates the natural meaning of the

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act. The taking,* which is made a part of the record, shows generally a careful exclusion of most of the lots not owned by the petitioner, even though in numerous instances this results in an interruption of the shore line and in many others leaves small lots owned by individuals surrounded by land taken. The impression created by looking at the plan of the taking was not inaccurately described in argument as a "checker board" effect. It was found by the Land Court that the commission interpreted the act to authorize them legally to "take such lands as they did take for the purpose of carrying out the intent of the law, which, for the protection of the present cottage owners and people who in the future may become cottage owners or occupants, was to be done by leasing or selling the lands taken." This statement aptly summarizes the effect of the act. It authorizes the taking of land a part of which may never be intended for any public purpose, but for lease or sale for private use. It would be possible for the commissioners, although strictly following the terms of the statute, to take this entire summer colony with its numerous houses and other buildings and substitute themselves for the petitioner as landlord, and lease all the cottages and buildings indefinitely, or ultimately to sell them. The statute would enable the establishment of what in essence would be a scheme for utilizing and developing a seashore summer resort for the benefit of cottagers on a scale of some magnitude. This being the meaning of the statute, it remains to inquire whether it is within the scope of legislative power.

The acquisition of land under the power of eminent domain to be devoted to private uses has been recently considered and discussed somewhat at length. It has been said that the exercise of the power of the State, either through taxation or eminent domain, to take land from one person with the intent of handing it over to another person, is not a public purpose and is contrary to basic and essential principles of free government. *Opinion of the Justices*, 204 Mass. 607. The underlying objection is that the main end of legislation for this purpose is a private utility

* In the decision of the judge of the Land Court it was stated that "This taking was filed by said Salisbury Beach Reservation Commission under the advice of counsel specially employed by said commission and without the knowledge of the Attorney General."

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rather than the general good. While incidentally it may be an advantage to the public that private persons prosper, if the essential character of the transaction in its direct object is private benefit to individuals, the purpose is not public. In a general sense it is of public interest that the people be well housed, but this does not authorize the State to become the general landlord. That subject is a proper one for the exercise of the police power but not of eminent domain. It was said by the Supreme Court of the United States, speaking through Mr. Justice Harlan in *Madisonville Traction Co.* v. *St. Bernard Mining Co.* 196 U. S. 239, 251: "It is fundamental in American jurisprudence that private property cannot be taken by the government, national or state, except for purposes which are of a public character, although such taking be accompanied by compensation to the owner. That principle . . . grows out of the essential nature of all free governments." Private property cannot be taken directly or indirectly for a private end. It cannot be seized ostensibly for a public use and then diverted to a private use. Legislation which is designed or which is so framed that it may be utilized to accomplish the ultimate result of placing property in the hands of one individual for private enjoyment after it has been taken from another individual avowedly for a public purpose is unconstitutional. It would enable that to be achieved by indirection which by plain statement would be impossible. These principles have been expounded at length in early decisions and recent opinions of this court with affluent citation of authorities. It is not necessary to do more than refer to a few of them. The case at bar is indistinguishable from them. *Lowell* v. *Boston*, 111 Mass. 454. *Wilkins* v. *Jewett*, 139 Mass. 29. *Mead* v. *Acton*, 139 Mass. 341. *Opinion of the Justices*, 204 Mass. 607. *Opinion of the Justices*, 204 Mass. 616. *Opinion of the Justices*, 211 Mass. 624. See also *Hairston* v. *Danville & Western Railway*, 208 U. S. 598; *Sanborn* v. *Van Duyne*, 90 Minn. 215; *Brown* v. *Gerald*, 100 Maine, 351.

The statute in the case at bar differs materially from others where the right to sell portions of real estate taken by eminent domain has been conferred. The metropolitan water act (St. 1895, c. 488, § 11) authorizes the sale of land "no longer needed for the water works" and the lease of "property not then so needed." Property acquired for the metropolitan sewerage sys-

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tem "no longer needed" therefor may be sold (St. 1892, c. 251, § 1), while the metropolitan park commission "for all purposes not inconsistent with the purposes specified in the act establishing said commission" are given certain modified rights of granting interests in lands. Statutes like these where the right to sell or lease manifestly is purely incidental to the chief public end and is confined by fair intendment to land or buildings either once actually needed and used, which have ceased so to be needed, or which by lease may promote the general public aim, afford no support to the broad powers here attempted to be created. See *Boston* v. *Boston Elevated Railway*, *ante*, 41. The same is true of the right to develop and sell power as incidental to a public undertaking. St. 1895, c. 488, § 3. *United States* v. *Chandler-Dunbar Water Power Co.* 229 U. S. 53, 72, 73. An absolute and unqualified power to sell and lease such as the present statute confers is different in kind from the carefully guarded powers conferred by the statutes to which we have referred. Moreover, a right to sell, when no longer needed, property taken or used for a public enterprise, requiring extensive works of construction where during the period of excavation or building land might be needed which would have no use on the completion of the work, is quite distinguishable from land taken for park or reservation purposes.

The taking here is not of a vast extent of wild or unsurveyed land whose agricultural and other possibilities are undiscovered. It is in one of the oldest towns of the State, is relatively small in area, and is a settled community with a large number of cottages and all its characteristics thoroughly capable of easy comprehension. It requires no discussion to distinguish the power conferred by the present statute from that given to the metropolitan park commission and other like officers to construct or lease buildings manifestly in furtherance of the convenient use by the people of the parks and reservation. A shelter or a restaurant or a bath house, to which all have access on equal terms, do not stand on the same basis as a resort to a considerable extent devoted to cottages to be leased to private families, and from which when leased or sold the public must be excluded.

The cases relied upon by the Commonwealth plainly are distinguishable. In *Boston* v. *Talbot*, 206 Mass. 82, the dominant

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purpose of the act under consideration was the construction of the tunnel in Boston. Its terms did not permit a taking of land with a contemporaneous knowledge and purpose that a definite and separable part was not necessary for the public use. The authority to sell land taken was conferred only when in the judgment of the transit commission it shall "cease to be needed," plainly implying an adjudication that once it had been needed, but by reason of changed conditions was no longer required. The real estate there in question consisted in large part of horizontal planes of a building, a substantial part of one floor of which was used permanently for the tunnel, and considerations of economy in taking an entire estate were weighty in sustaining the statute. The reasoning of that opinion shows a wide divergence from the arguments urged on behalf of the Commonwealth and a reliance upon quite different facts. The only one there relied on which seems to us to have any connection with the case at bar is that it may be cheaper to take the entire estate of the petitioner with the power to sell or lease a part of it than to take the part intended to be used for a reservation. The dominant purpose of this act affords no justification for the application of that principle. Here no excavations or constructions are contemplated which warrant the inference that any property would be injured in such a way as to cause real apprehensions of future danger which might prove groundless in actual experience or embarrassment in the assessment of damages. Any taking of a part of the property of the petitioner apparently would present the ordinary questions of assessment of the damage which are of common occurrence. *Moore* v. *Sanford*, 151 Mass. 285, upheld the constitutionality of a statute which authorized the taking and filling of flats adjacent to flats of the Commonwealth and the subsequent sale of the filled land. But this was on the express ground that it was for the improvement of Boston Harbor to which was annexed the reclamation of property of little or no worth without such improvement. The principle of development of lands substantially useless under private control compared with their potential value as part of a general scheme of public improvement through the regulation of the common interests of owners always has been relied on with caution although it was held to be constitutional in our early case of *Talbot* v. *Hudson*, 16 Gray, 417, and has been applied in

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supporting the numerous statutes establishing irrigation districts. *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112. *Clark* v. *Nash*, 198 U. S. 361. *Strickley* v. *Highland Boy Gold Mining Co.* 200 U. S. 527. See *Otis Co.* v. *Ludlow Manuf. Co.* 186 Mass. 89; *S. C.* 201 U. S. 140; *Turner* v. *Nye*, 154 Mass. 579, 582; *Wurts* v. *Hoagland*, 114 U. S. 606. But this principle has no relation to the case at bar. *Hellen* v. *Medford*, 188 Mass. 42, affords no support to the contention of the Commonwealth. The statute there under consideration was held to be unconstitutional, but the plaintiff was not in a position to take advantage of it, a principle frequently applied but having no bearing upon the issues here raised, where the petitioner from the beginning has assailed this statute and has done nothing to waive its rights.

It is impossible to separate the valid from the invalid parts of this statute. The power of the commission to take land is inextricably interwoven with the power to sell and lease land so taken. It cannot be determined how the Legislature would have dealt with the subject matter if their attention had been directed specifically to the point that land and buildings, including a large number of dwelling houses, could not be taken for the purpose of lease and sale under the changed conditions of being in the neighborhood of a public reservation and the expense of the undertaking lessened by the revenue to be derived therefrom. Different financial and other questions would have been presented, which might have caused the General Court to have refrained from action or to have enacted a statute of other tenor. *Edwards* v. *Bruorton*, 184 Mass. 529. *Commonwealth* v. *Hana*, 195 Mass. 262, 267.

We feel constrained to pronounce the statute unconstitutional. It becomes unnecessary to pass upon the other questions raised by the report.

Case remanded to the Land Court for further proceedings in accordance with this opinion.

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CORNELL-ANDREWS SMELTING COMPANY *vs.* BOSTON AND PROVIDENCE RAILROAD CORPORATION, CLARENCE L. WATSON, intervening petitioner.

Bristol. March 5, 6, 1913. — June 21, 1913.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DE COURCY, JJ.

Practice, Civil, Exceptions, Conduct of trial: requests, rulings and instructions, New trial. *Way,* Private. *Deed,* Construction. *Damages,* For property taken or injured under statutory authority. *Corporation,* Foreign. *Evidence,* Opinion: experts, Of value, Relevancy and materiality, Competency.

In a bill of exceptions testimony should not be set forth at length by question and answer when its substance can be stated in a narrative form.

The setting forth of exceptions to the manner in which a trial judge dealt with requests of various parties for rulings, by stating all of the requests at length without stating which were refused and which were granted and leaving this court to learn how the requests were dealt with from an examination of the charge to the jury and of colloquies between the judge and the counsel for the various parties, which also are set out in full, is a course which cannot be too strongly condemned. By SHELDON, J.

Where the owner of land used exclusively for agricultural purposes conveys a part of it by a deed containing a provision reserving "a right of open way" from the remainder of the land through the portion conveyed to a street, a subsequent grantee of the remainder of the land may use such way not only for agricultural purposes but also for any changed use to which it reasonably may be put in connection with the use of his land.

Where a deed to a railroad corporation of a part of a farm contains a stipulation for a "passway" for the benefit of the grantor "over" the railroad "for farming purposes," a successor in title to the grantor has no right of way over the land so conveyed for any other than farm purposes.

At the trial of a petition by a lessee of land against a railroad corporation for damages resulting from the abolition of a grade crossing of a private way with the railroad, where the lessor of the land has been admitted as an intervening petitioner, the railroad corporation, against whom the entire damages are to be assessed, has no right to raise the question, whether the damages shall be assessed and paid to a trustee according to the provisions of R. L. c. 48, §§ 17, 18, or shall be apportioned by the jury and paid to the various parties interested in accordance with §§ 20–24 of that chapter.

At the trial of a petition by a lessee of land for damages resulting to him from the abolition of a grade crossing with a private way in the course of which another private way, which was the petitioner's only means of going to and from the leased premises, was discontinued by the construction across it of a new street at an elevation, the petitioner claimed damages resulting from the fact that by such construction buildings and machinery, which he had placed upon the premises, and his lease were greatly reduced in value or rendered worth-

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less, and he was *held* not to be limited in his damages to what it would cost to buy land to construct another way, or to the cost of building a way out of his premises, although those were circumstances to be considered in assessing damages.

At the trial of a petition by a foreign manufacturing corporation for damages resulting to it from the abolition of a grade crossing with a private way in the course of which another private way, which the petitioner contended was the only means of going to and from its premises, was discontinued by the construction across it of a new street at an elevation, the judge, subject to an exception by the respondent, instructed the jury that the foreign corporation was not an inhabitant of the town where its factory was and had no right to petition the selectmen of the town under R. L. c. 48, § 65, for a new private way, and immediately added that it could make such an application to the county commissioners, who had power to deal with it, and fairly left it to the jury to say how far the value of the property and the amount of the damages to be assessed were affected by the possibility of such a way being laid out and constructed. *Held*, that, if the first ruling had stood alone, it might have been difficult to sustain, but that, in view of the other rulings, the exception must be overruled because the respondent was not harmed thereby.

Upon a petition against a railroad corporation by a foreign manufacturing corporation for damages sustained by the petitioner as lessee of certain land by reason of changes made in the abolition of a grade crossing of the railroad with a private way, it is immaterial that, at the time when the petitioner received its lease, it had not complied with the statutes requiring it to file with the commissioner of corporations, among other documents, an appointment of him as its agent for receipt of service, if it appears that it had complied with such statutes before the decree of court ordering the abolition of the crossing.

At the trial of a petition for damages resulting from the abolition of a grade crossing of a railroad and a private way, where the value of certain buildings is an issue, an experienced builder who constructed the buildings may be permitted in the discretion of the judge to testify as an expert as to their value at the time of their erection and at the time of the decree of court abolishing the crossing, which was four years later, although he is not acquainted with the value of real estate in the town where they are situated.

Where, at the trial of a petition against a railroad corporation by a manufacturing corporation for damages resulting from the abolition of a grade crossing of the railroad with a way, the petitioner at the request of the respondent has produced its books and they have been examined by an expert in behalf of the respondent, one who was the secretary of the petitioner during the period covered by the books may be allowed to testify as to their contents.

At the trial of a petition against a railroad corporation, by a corporation engaged in rolling, smelting and refining, for the assessment of damages caused by the discontinuance, in the course of operations in connection with the abolition of a grade crossing of the railroad with a way, of a private way which, the petitioner contended, was the only means of going to and from the petitioner's premises, it appeared that the petitioner's factory was upon land which it held under a lease, and the petitioner contended and offered evidence tending to show that, by the discontinuance of the way in question, operation of its plant was rendered impossible and its machinery and buildings were rendered worthless. Expert witnesses, testifying in its behalf, were asked, and, subject to exceptions

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by the respondent, were permitted to answer questions relating to the existence or non-existence of other factories in New England engaged in rolling, smelting and refining. *Held*, that the testimony was neither incompetent nor prejudicial to the respondent.

Upon a petition against a railroad corporation by a lessee of land for the assessment of damages resulting from the abolition of a grade crossing of the railroad with a way, where it appears that in connection with such abolition a street was constructed at an elevation near the petitioner's factory, the petitioner may be allowed to show, as bearing upon the alleged decrease in the value of the real estate which it held under lease, that dust and dirt came into the factory from such new street after it was completed.

At the trial of a petition for the assessment of damages resulting from the abolition of a grade crossing of a railroad with a way, where the petitioner is a manufacturing corporation which occupies with its factory certain land, access to which, it contends, was so effectually cut off by operations in connection with the abolition of the crossing that its factory and machinery and lease were rendered worthless, the petitioner may show that, previous to the changes made in the course of such abolition, the property was insurable, and that after the changes it was not insurable.

The rules for the assessment of damages, which were declared in *Cornell-Andrews Smelting Co.* v. *Boston & Providence Railroad*, 202 Mass. 585, and 209 Mass. 298, to be proper to apply in that case, here were reaffirmed on exceptions taken by the respondent and an intervening petitioner at a new trial of the case.

Certain land was leased to a manufacturing corporation for a term of years, the lease contemplating that the lessee should erect buildings on the land in which it should install machinery and other valuable trade fixtures, some of which it would have a right to remove, and that it should have a right of way across other land of the lessor to another private way, which ran beyond the lessor's land in both directions and which it also was given a right to use. In connection with the construction of a new street in the abolition of a grade crossing of a railroad with the second private way, the first private way was discontinued and the corporation's use of the second way thereby was cut off. Upon a petition by the corporation against the railroad corporation for the assessment of the damages thereby sustained, the lessor became an intervening petitioner, and it was *held*, that the proceedings properly were under R. L. c. 48, §§ 20–24, and not under §§ 17, 18, of that chapter.

Whether, in ruling upon a motion by a defendant, after a verdict for the plaintiff, asking for a new trial on the grounds that the verdict was against the evidence, the weight of evidence and the law, and that the damages were excessive, it is proper for the trial judge to make an order that the motion shall be allowed, "provided" that the defendant files a waiver in writing of exceptions taken by him at the trial, the motion to be denied if no such waiver is filed, here was not determined, a new trial being ordered by this court on other grounds.

PETITION, filed on March 19, 1906, by a Rhode Island corporation for damages caused in the course of the abolition under a decree of the Superior Court dated July 2, 1904, of a grade crossing of a private way in Attleborough called Maple Street and the respondent's railroad.

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The case previously had been before this court twice, the former decisions being reported in 202 Mass. 585 and 209 Mass. 298.

The case again was tried in the Superior Court before *Ratigan*, J.

The petitioner occupied for manufacturing purposes, under a lease from one Clarence L. Watson, a portion of a large tract of land belonging to Watson, the terms of the lease giving it a private right of way running northerly and southerly between the leased premises and another private way, Maple Street, which ran easterly and westerly through the remainder of Watson's land, and, beyond Watson's land, on the east crossed the defendant's railroad and ran to South Main Street and on the west crossed Ten Mile River and ran to County Street. In the abolition of the crossing, Olive Street Extension was constructed at an elevation across the private way granted in the petitioner's lease. The petitioner contended that thereby it effectually was cut off from all use of Maple Street and the streets beyond.

The extent of the petitioner's right to use Maple Street was in issue. The respondent contended and asked rulings substantially to the effect that the petitioner had suffered no damage with respect to any right to cross the railroad tracks, and that Watson had no right to use Maple Street beyond his land toward County Street for other than farming purposes. The petitioner contended that it had a right to use the way in both directions for all purposes. The judge at first ruled that the petitioner's right to cross the railroad was for farming purposes only. Later he refused to give all of the rulings asked for by the respondent as to any limitation of the petitioner's rights to the use of Maple Street, and, as stated in the opinion, read a portion of the opinion of this court reported in 202 Mass. at pages 595, 596, 597. The respondent excepted to the failure to give the rulings it requested.

It appeared in evidence at the trial that at the time of the delivery of the lease by Watson to the petitioner, April 2, 1900, the petitioner had not complied with the provisions of the statutes as to foreign corporations doing business within this Commonwealth. It did so comply, however, on April 1, 1901. On this question the respondent, in requests numbered nine and ten, asked for rulings to the effect that the "failure on the part of the petitioner to comply with the laws of this Commonwealth relating

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to foreign corporations, the laws of 1884, c. 330, and acts amendatory thereof, and with the laws of 1895, c. 157, and acts amendatory thereof, prevented it from acquiring an interest in the property as a tenant for ten years;" and that thereby "the petitioner was prevented from acquiring, at the time the building was erected and the machinery affixed as trade fixtures and at any later time, the right to remove the building and the said machinery." The judge refused to give such rulings, but ruled, in accordance with a request by the petitioner, that it was "not material in this case whether the petitioner did or did not file the appointment of agent to accept service with the commissioner of corporations before it began putting up the buildings."

The witness Hartwell, referred to in the opinion, testified that the petitioner's buildings were worth $7,800 in 1900, when he built them, and $9,300 in 1904, the date of the decree abolishing the crossing.

The witness Andrews, referred to in the opinion, was one Frank H. Andrews, who was secretary of the petitioner from the time of its organization until June, 1906. The books of the petitioner which, as stated in the opinion, at the request of the respondent were produced by the petitioner for examination by an expert employed by the respondent, included only books in use by the petitioner during the time that Andrews was its secretary.

In admitting the first expert testimony offered "about the existence or non-existence of other factories in New England engaged in rolling, smelting and refining," referred to in the opinion, the judge stated: "I suppose [the petitioner's counsel] is laying the foundation for something he may want further on. I should permit him to go into it. Whether or not the other question would be admissible is a matter I don't rule on at the present." Similar questions afterwards were asked of another expert witness, and the judge, subject to an exception by the respondent, permitted them to be answered, making no comment when he stated his ruling. No motion to strike out such evidence was made by the respondent at any time.

A witness, who qualified as an expert in insurance matters and as familiar with the petitioner's property, testified, subject to an exception by the respondent, that, while, before the changes incident to the abolition of the grade crossing were made, the prop-

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erty of the petitioner was insurable, after those changes it was not insurable even at a high rate.

The twenty-second ruling requested by the respondent and referred to in the opinion, was as follows: "If the jury find that the only damages suffered by the petitioner were due to the loss of access, and that a way practicable for all reasonable and necessary purposes of transportation or of travel for the remainder of the term of the lease could have been had to the street, then the cost of obtaining such a way would be the measure of damages or the difference in the fair market value of the leasehold."

Other material facts are stated in the opinion.

The jury assessed the damages resulting from the changes incident to the abolition of the grade crossing in the sum of $50,196.57, and apportioned to the petitioner $49,654.57, and to an assignee of the lessor Watson $542. In answer to special questions, the jury found that the petitioner suffered no special damage during construction, and that the damage in the matter of access amounted to $300. The respondent and the assignee of the lessor Watson alleged exceptions.

The respondent and the intervening petitioner filed motions for a new trial, the first three grounds of which were that the verdict was against the law, that it was against the law and the evidence, and that it was against the evidence and the weight of the evidence. The fourth ground stated in the motion of the respondent was that the damages awarded were excessive. The fourth ground stated in the motion of the intervening petitioner was that the damages awarded to him were "disproportionate, insufficient and inadequate on any and all possible views of the evidence."

The judge ruled upon the motions as follows:

"The motion of the assignee of Clarence L. Watson* is overruled.

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* During the trial of this case the judge stated to the jury in substance that it was agreed by the respondent and the intervening petitioner that Thomas W. Hoogs of Boston was "assignee under a written assignment of all the right, title and interest that Clarence L. Watson, lessor," had in the property described in the petition, and "that the said Thomas W. Hoogs is an employee of, and the agent of the New York, New Haven & Hartford Railroad Company, lessee of the respondent, the Boston & Providence Railroad Corporation."

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"The motion of the respondent is to be allowed unless the Cornell-Andrews Smelting Company, one of the petitioners, consents in writing within thirty days from the date of the filing of this order to remit all damages in excess of $35,000, and provided further that said respondent files in this Court within said time a written waiver of its exceptions or of its rights to file exceptions in case the exceptions have not already been filed.

"If the respondent does not so file waiver of its exceptions as aforesaid the motion is denied."

To these rulings upon their motions for a new trial, the respondent and the intervening petitioner alleged further exceptions.

J. L. Hall, for the respondent.

J. W. Burke, for the intervening petitioner.

C. R. Cummings, for the petitioner.

SHELDON, J. This case is somewhat troublesome to deal with by reason of the number and complexity of the questions presented and the difficulty of picking out the decisive points. But that difficulty has been considerably and needlessly increased by the course of the respondent in setting out the testimony by question and answer instead of giving the substance of the evidence in a narrative form. This is a reprehensible method of alleging exceptions. See *Odabashian* v. *Apsley Rubber Co.* 214 Mass. 66. In *Ryder* v. *Jenkins*, 163 Mass. 536, it was held that a bill of exceptions in which all the testimony was stated at length without any attempt at abridgment was rightly disallowed. The language of the statute (R. L. c. 173, § 106) has been modified since that decision, but it would be hard to say that its meaning had been materially altered. See the cases collected in *Commonwealth* v. *New York Central & Hudson River Railroad*, 206 Mass. 417, 419. In *Clemens Electrical Manuf. Co.* v. *Walton*, 173 Mass. 286, there had been an attempt to abridge the evidence. Moreover, all the requests for rulings made by the petitioner, the respondent and the intervening petitioner, are inserted *in extenso*, without stating what ones were given and what were refused, but the court is left to ascertain these important questions from an examination of the charge and of the colloquies between the judge and the different counsel, which are also reported in full. As was said in *Burt* v. *Merchants' Ins. Co.* 115 Mass. 1, 16, such a course cannot be too strongly condemned. No objection however has

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been made to the exceptions, by motion to dismiss or otherwise, and we have considered them.

1. We find no error of law in the rulings made as to the boundaries of the land leased to the petitioner, and as to the petitioner's being entitled to some right of way to South Main Street over the respondent's railroad. The land leased to the petitioner was bounded easterly by the respondent's land, though called its layout, and did not purport to be bounded by the original layout of the respondent's railroad. This is too manifest to need discussion. The deed given by Watson and Newell to the respondent reserved to those grantors the right of way over the railroad. This must have been intended and understood to include, indeed it necessarily did include, the right to pass over all the width of the respondent's land, including that conveyed by the deed in question. Otherwise the reservation would have had no effect. That was the right which Watson enjoyed and could transfer to the petitioner; and it sufficiently appears that it was the way actually used by the petitioner over the railroad.

The right of way in the other direction was described in the deed from Manchester to Wolfenden as "a right of open way from my land easterly of said river [Ten Mile River] through said lane to County Street." At this time and previous thereto, according to the testimony of Manchester, a witness for the respondent, the land to which this way was appurtenant, which afterwards passed to Watson, and a part of which constituted the land leased to the petitioner, had no structures upon it and was used exclusively for agricultural purposes. So far as appeared, that part of the way to South Main Street which crossed the respondent's railroad was created in 1836, by the stipulation in the deed of Leprilete Sweet to the respondent for a passway "over said road for farming purposes." This gave a right to use that "passway" for farming purposes only; and the petitioner, as to that part of the way which crossed the original location of the railroad acquired no right to use it for any other than farm purposes. *Atwater* v. *Bodfish*, 11 Gray, 150. *Parks* v. *Bishop*, 120 Mass. 340. *Baldwin* v. *Boston & Maine Railroad*, 181 Mass. 166, 168. *Nye* v. *Swift*, 190 Mass. 143, 147. *Allan* v. *Gomme*, 11 Ad. & El. 759. *Henning* v. *Burnet*, 8 Exch. 187. There was not here a general grant or reservation of an unrestricted right of way, as might have been the case if the question

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had arisen under language like that in the deed from Manchester to Wolfenden, "a right of open way." Had there been in the deed from Sweet to the respondent such a reservation of an unrestricted right of way, the weight of authority is in favor of the contention that the way would have been available to the owners of the dominant estate for any changed use to which that estate afterwards might reasonably be put. *Johnson* v. *Kinnicutt*, 2 Cush. 153, 157. *Blood* v. *Millard*, 172 Mass. 65. *Gorton-Pew Fisheries Co.* v. *Tolman*, 210 Mass. 402, 412. *Randall* v. *Grant*, 210 Mass. 302. *Abbott* v. *Butler*, 59 N. H. 317. *Arnold* v. *Fee*, 148 N. Y. 214. *Gunson* v. *Healy*, 100 Penn. St. 42. Accordingly, so far as the way to County Street is concerned, we find no error in the rulings made at the trial. We do not overlook the fact that there was evidence of a more unrestricted use of the way over the railroad; but the purpose for which this evidence was admitted was narrowly limited, and we cannot treat it as tending to show that any increased right had been gained by prescription. The petitioner's lease did purport to give to it a right of way over the railroad; but that could pass no greater right than belonged to Watson himself. In the absence of evidence that any increased right had become vested in the petitioner, the jury should have been instructed that the petitioner had no right to use that portion of the way which crossed the railroad for any other than farming purposes.

This ruling was made at first; but the judge afterwards withdrew it, and instead thereof read to the jury some of the language used in the opinion of this court reported in 202 Mass. 595, 596, 597. That language, however correct upon the facts then appearing, was inapplicable to the issue as presented at this trial. For this reason the respondent's exceptions must be sustained.

2. The contention that the damages should be assessed according to the provisions of R. L. c. 48, §§ 17, 18, and not in the manner prescribed by §§ 20–22 of the same chapter, we do not consider to be open to the respondent. It has no concern with the division of the damages between the lessor and the lessee. *Proprietors of Locks & Canals* v. *Nashua & Lowell Railroad*, 10 Cush. 385, 387. *Providence, Fall River & Newport Steamboat Co.* v. *Fall River*, 187 Mass. 45, 50. As was said by Wells, J., in *Edmands* v. *Boston*, 108 Mass. 535, 547, these questions "are important only as between the several petitioners."

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3. The judge rightly ruled that the measure of damages was not what it would cost to buy land to construct a way, or the cost of building a way out of the petitioner's premises. That was a circumstance to be considered; but it was not as matter of law the measure of the damages. This is settled by the former decisions of this case. 202 Mass. 585, 599 *et seq.*; 209 Mass. 298, 314, 315. The instructions as to this point and as to the respondent's second request were adequate and correct. The judge ruled also that the petitioner, being a foreign corporation, was not an inhabitant of Attleborough, and had no right to apply to the selectmen of that town to lay out a way under the provisions of R. L. c. 48, §§ 65, 74. The respondent contends that this ruling was erroneous. If this ruling had stood alone, it may be that there would have been some difficulty in sustaining it. But that is not the case. The judge immediately added that the petitioner could have applied to the county commissioners, and that it would be for those commissioners to pass upon the application. Whether this was right or wrong, the respondent cannot complain of it. And the judge fairly left it to the jury to say how far the value of the property and the amount of the damage to be assessed was affected by the possibility of such a way being laid out and constructed. The respondent was not aggrieved by the rulings made upon this branch of the case.

4. The respondent's ninth and tenth requests were properly refused. *Rogers & Co.* v. *Simmons*, 155 Mass. 259. *National Fertilizer Co.* v. *Fall River Five Cents Savings Bank*, 196 Mass. 458. *Thornley* v. *J. C. Walsh Co.* 200 Mass. 179. The petitioner had complied with the requirements of our statutes, not only before this suit was brought, but before the making of the decree by which its property was affected.

5. We cannot say that the judge erred in admitting Hartwell's testimony as to the fair market value of the buildings. He was an experienced builder, and had constructed the buildings for the petitioner's original plant. That he was not acquainted with the prices paid for real estate in Attleborough was not decisive against the competence of his testimony. He testified only as to the buildings.

6. The testimony of Andrews as to what he found in the books of the petitioner could be admitted in the discretion of the judge.

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The petitioner had produced the books at the request of the respondent, and the respondent had examined them by its expert. They could have been put in evidence by the petitioner. *Long* v. *Drew*, 114 Mass. 77. This being so, the questions put could properly be allowed. *Boston & Worcester Railroad* v. *Dana*, 1 Gray, 83, 104. *Jordan* v. *Osgood*, 109 Mass. 457, 464. *Bicknell* v. *Mellett*, 160 Mass. 328.

7. We cannot say that the testimony about the existence or non-existence of other factories in New England engaged in rolling, smelting and refining was either incompetent or prejudicial to the respondent.

8. The testimony as to dust and dirt coming into the factory from the causeway of the new street after that had been completed was not prejudicial to the respondent. See *Hubbard* v. *Webster*, 118 Mass. 599; *Pye* v. *Faxon*, 156 Mass. 471, 474; *Cotton* v. *Boston Elevated Railway*, 191 Mass. 103; *Hyde* v. *Fall River*, 189 Mass. 439. Testimony that dust and dirt came from the railroad after the change of grade had been made was excluded. The petitioner was not allowed to recover for injury to its business.

9. The testimony as to the insurability of the property was not incompetent. This was a circumstance that might affect its value. If the effect was a permanent one, that also might be shown. The jury were told to consider this evidence only as it might affect the market value of the property. *Webber* v. *Eastern Railroad*, 2 Met. 147. Here, as in many of its exceptions, the respondent seems to have overlooked the fact that the first question which the jury were to decide was the amount of the whole damage done to the property considered as one undivided estate, and that the respondent had nothing to do with the subsequent apportionment of this amount between the lessor and the lessee.

10. It is not necessary to discuss the respondent's other exceptions. None of them can be sustained. The rules of damages to be applied have been sufficiently declared in the former decisions made in this case. 202 Mass. 585; 209 Mass. 298. We do not care to reiterate the reasoning of those opinions.

11. The exceptions of the intervening petitioner raise the question whether the damages rightly were assessed under the provisions of R. L. c. 48, §§ 20–22, or whether the rule of division laid down in §§ 17, 18 of the same chapter should have been fol-

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lowed. But that now is hardly an open question. It was really decided against the present contention of the intervening petitioner in the first opinion rendered in this case. *Cornell-Andrews Smelting Co.* v. *Boston & Providence Railroad*, 202 Mass. 585, 597, 598. It was held again when the case once more came before us (209 Mass. 298, 314) that the proper course to be taken was that which was adopted at the last trial. It was there said by Loring, J., after he had shown that the lessor ought to file an intervening petition in this action: "At the trial on the lessee's petition and that intervening petition the entire damage done to the land leased to the Cornell-Andrews Company, including the buildings and the fixed machinery put in them by the lessee, must be determined and set forth in the verdict. Then the amount of this entire damage . . . must be apportioned between the lessor and lessee." The rights of the lessor and the lessee as between themselves depend of course upon their agreements as shown by the lease. That was not a bare lease of the land. It gave to the petitioner rights of way outside the leased premises, which rights apparently were of value, and, it is contended, have been practically destroyed by the taking. It was contemplated that the lessee should erect buildings and install machinery; and it did so. It had a right to remove these trade fixtures, or some of them. This it has not done; but one of its complaints, one of the grounds upon which it claims damages, is the injury to the value of the property which it had a right to remove, an injury which it contends was so great as to be tantamount to a destruction of that value; and it is for the jury to pass upon the validity of this claim and to determine what damages, if any, should be allowed therefor. The case comes within the doctrine of *Edmands* v. *Boston*, 108 Mass. 535, and *Providence, Fall River & Newport Steamboat Co.* v. *Fall River*, 187 Mass. 45. The remarks in *Willard* v. *Boston*, 149 Mass. 176, 178, and *Galeano* v. *Boston*, 195 Mass. 64, 67, that the question is to be determined by the condition of the title as shown at the trial, refer to the condition of the title at the time of the bringing of the petition. It is the condition at that time which fixes the rights of the parties, and the proof of which at the trial enables the court to determine what those rights are. Those remarks do not mean that the question is to be reopened at each new trial, and that the result reached is to be varied according as some particular estate or some one of

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its incidents may have undergone a change since the bringing of the petition or since the former trial, or as some right to remove trade fixtures may or may not have been exercised in the meantime or may have had its value increased or lessened by the effect upon those fixtures of the taking made. Such circumstances may, by throwing a new light upon the old situation, cause a change in the *quantum* of damages to be allowed, or in the amount of the respective shares to be apportioned to the different parties in interest; but they cannot affect the right which either party has acquired to have the damages assessed and apportioned in the one way or the other, as would have been the case if the assessment and apportionment had actually been made, as theoretically they are made, at the very instant of the taking when the right of the owners of the different estates or interests accrued.

12. The intervening petitioner has argued also that the lessee had no right to remove the buildings and fixed machinery from the leased land, that they became when erected and installed the absolute property of the lessor. But this is not open upon his exceptions. The judge expressly ruled at the request of the intervening petitioner, that with respect to the damage to the use and occupation of the land, including the building and fixed machinery, the lessor Watson is entitled to all the damage for the period subsequent to the unexpired term of the lease. That included everything asked for by the intervening petitioner with reference to this part of the case. He did not ask for a ruling that there never had been a right of removal of the buildings and fixed machinery, and did not except to the rulings made upon this question. As there must be a new trial, we add that so far as his present contentions go further than the rulings that were made at his request, we regard the previous decisions made in this case as decisive against him.

13. No error is shown by any of the other exceptions alleged by the intervening petitioner.

As the petitions must be tried again, we have no need to consider the questions raised by the exceptions to the judge's conditional order for a new trial.

Exceptions sustained.

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ATTORNEY GENERAL *vs.* HAVERHILL GAS LIGHT COMPANY.

Suffolk. January 24, 1913. — May 26, 1913.*

Present: RUGG, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Gas Company. Public Service Corporation. Corporation, For public service. *Constitutional Law. Words,* "Franchise."

A corporation, created by or organized under the laws of this Commonwealth for the purpose of manufacturing and selling gas for light and heat in a certain city, is a public service corporation, and, except by legislative authority, cannot part with its franchise and property in such a way as to deprive itself of the power to perform its public duties.

As was pointed out in *Weld* v. *Edison Electric Illuminating Co.* 197 Mass. 556, the policy which has been developed in Massachusetts respecting the furnishing of artificial light is that of a regulated monopoly. By RUGG, C. J.

In R. L. c. 121, § 13, which provides that a gas company "shall not transfer its franchise . . . without the authority of the General Court," the word "franchise" means the right to manufacture and supply gas for a particular locality and to exercise the special rights and privileges in the streets and elsewhere which are essential to a gas company for the proper performance of its public duty and for the private gain without which it could not exist successfully.

Under R. L. c. 121, § 13, which provides that a gas company "shall not transfer its franchise . . . without the authority of the General Court," a sale by a gas company, authorized by its charter to manufacture and sell gas in a certain city, of all its physical property, including its mains and pipes in public ways, to a corporation organized for the purpose of taking over such property under a general scheme for improving the facilities for providing gas for that city, with the understanding that the selling corporation shall surrender its charter after the sale, is an attempted evasion of the statute, and is of no effect without legislative authority.

R. L. c. 121, § 13, re-enacting in substance St. 1886, c. 346, § 4, and providing that "a gas company shall not transfer its franchise, lease its works or contract with any person, association or corporation to carry on its works, without the authority of the General Court," is constitutional.

INFORMATION IN EQUITY, filed in the Supreme Judicial Court on July 8, 1912, under St. 1906, c. 372, by the Attorney General at the relation of the commissioner of corporations, to restrain the Haverhill Gas Light Company, a corporation created by St. 1853, c. 8, amended by St. 1853, c. 163, from selling and transferring its franchise and property to the Haverhill Gas Company, a cor-

* This case is printed out of its order by reason of a temporary withdrawal of the opinion.

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poration recently organized under the general laws of this Commonwealth.

The case came on to be heard before *Morton*, J., who reserved it for determination by the full court.

J. M. Swift, Attorney General, (*F. B. Greenhalge*, Assistant Attorney General with him,) for the plaintiff.

B. E. Eames, (*J. J. Winn & W. C. Rice* with him,) for the defendant.

RUGG, C. J. This is an information in equity brought under St. 1906, c. 372, which authorizes this court at the relation of the Attorney General to restrain any corporation "from assuming or exercising any franchise or privilege or transacting any kind of business not authorized by the charter of such corporation and the laws of this Commonwealth." The bill alleges in substance, that the defendant, having for a long time been engaged in the business of manufacturing and selling gas for light and heat in the city of Haverhill, is about to sell "all of its franchises and property in the said city, including all of its mains, pipes and other appurtenances necessary for or incidental to the manufacture and sale of gas for light and heat, without authority from the General Court and without authority of any law," and that thereby it will become unable to continue its business of furnishing gas for light and heat. The answer and certain agreed facts admit the purpose of the defendant to dispose of all its physical property, including its mains and pipes in the public ways of Haverhill to the Haverhill Gas Company, a corporation recently organized under the laws of the Commonwealth, for the purpose of taking over the physical properties of the defendant as a part of a general scheme for improving the facilities for providing gas in the city of Haverhill. The point at issue is, whether the defendant has a right under the general law without special authority from the Legislature to sell its physical properties, including its pipes and mains in streets necessary to the carrying on of its business, and thus deprive itself of its facilities for doing business. The defendant does not undertake directly to transfer its right to be a corporation, (but proposes to surrender it) nor its licenses and permits granted by the municipal authorities to lay its pipes in public ways. It is contended that the new corporation has licenses and permits to act in its own right in maintaining such pipes to be sold

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to it. There are numerous statements in the answer respecting contracts and alleged grants from the city council of Haverhill to the Haverhill Gas Company. It is not necessary to describe these in detail, nor to inquire whether the alleged permits to lay pipes granted to the Haverhill Gas Company are valid. See *Metropolitan Home Telephone Co.* v. *Emerson*, 202 Mass. 402. Sufficient appears upon the record to warrant the assumption that the Haverhill Gas Company would be able to furnish gas in sufficient quantities and of required quality if given the opportunity.

In *Weld* v. *Gas & Electric Light Commissioners*, 197 Mass. 556, it was said by the court speaking through Chief Justice Knowlton, referring to a gas and electric light company:

"The respondent is a corporation, organized to exercise a public franchise of importance to the community in which it conducts its business. It is its duty to exercise this franchise for the benefit of the public, with a reasonable regard for the rights of individuals who desire to be served, and without discrimination between them. It cannot relieve itself from this duty so long as it retains its charter. It enjoys public rights in the streets, which are derived from the Commonwealth, through action of the board of aldermen under authority of the Legislature. It is a *quasi* public corporation, and as such it owes duties to the public. *New Orleans Gas Co.* v. *Louisiana Light Co.* 115 U. S. 650. *Coy* v. *Indianapolis Gas Co.* 146 Ind. 655, 659. *Williams* v. *Mutual Gas Co.* 52 Mich. 499, 501. *Shepard* v. *Milwaukee Gas Light Co.* 6 Wis. 539. *Gas-Light Co. of Baltimore* v. *Colliday*, 25 Md. 1. Without legislative authority it cannot sell its property and franchise to another party, in such a way as to take away its power to perform its public duties. *Central Transportation Co.* v. *Pullman's Palace Car Co.* 139 U. S. 24, and cases cited. *Brunswick Gas Light Co.* v. *United Gas, Fuel & Light Co.* 85 Maine, 532. *Gibbs* v. *Baltimore Gas Co.* 130 U. S. 396. *Thomas* v. *Railroad Co.* 101 U. S. 71, 83. *Chicago Gas Light & Coke Co.* v. *People's Gas Light & Coke Co.* 121 Ill. 530. *South Chicago Railway* v. *Calumet Electric Street Railway*, 171 Ill. 391. *State* v. *Hartford & New Haven Railroad*, 29 Conn. 538."

This is a succinct, clear and comprehensive statement of the law. It rests upon fundamental conceptions of the character of service rendered by gas companies and of the nature of the in-

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strumentalities utilized by them in performing their duties. The defendant is empowered by its charter (St. 1853, cc. 8, 163) among other matters to lay and repair pipes in the streets and highways of what is now the city of Haverhill, when granted a license by municipal officers. The authority to use the public ways is, according to common knowledge, one of the important and essential privileges conferred upon the defendant. Its ability to carry on business rests on the power to use exclusively a part of the public ways for the purpose of laying its pipes and distributing its product. The right acquired by the public in laying out a highway is an easement for public travel. It would be incompatible with the right obtained by the public through the laying out of a highway to devote it in whole or in part to strictly private uses. *Commonwealth* v. *Morrison*, 197 Mass. 199. It is only the element of service rendered to the public by a gas company which warrants the laying of its pipes in highways. It has been said repeatedly in decisions of this court that the paramount right acquired by the public in land taken for highways includes the laying of gas pipes. The charter authority of the defendant to lay its pipes in public ways, although not in express terms made dependent upon such reasonable limitations and regulations as the Legislature might impose from time to time, was not absolute and unqualified in character, and was subject by implication to the general power of the Legislature over highways. It would be within the power of the Legislature to pass any reasonable restrictions at any time touching the use of the highway. *Fair Haven & Westville Railroad* v. *New Haven*, 203 U. S. 379, 390. This includes proper regulations of the conditions under which a gas company may use highways. The language in *Commonwealth* v. *Lowell Gas Light Co.* 12 Allen, 75, which seems to look in a different direction, occurs in the decision of a tax case and was directed to the argument that a gas light company was a corporation of such a character that it was exempt from local taxation. It was quoted at length in *Milford Water Co.* v. *Hopkinton*, 192 Mass. 491, 497, to the same point. It must be read in the light of the subject as to which it was used. So read there is nothing in it inconsistent with the proposition that the privilege of appropriating exclusively a portion of the highway involves and is predicated upon a kind of public service.

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It is plain and it has been the declared law of the Commonwealth since the *Opinion of the Justices* in 150 Mass. 592, that gas companies are *quasi* public corporations performing an important service of a kind so essentially for the general public that cities and towns may be authorized to undertake the service and appropriate money therefor. This opinion was founded upon the proposition that the manufacturing and distribution of gas for the use of the municipality and its citizens is a public service, and hence the business could be undertaken by municipalities as a part of their general governmental functions. It is familiar law that money raised by taxation can be appropriated only for public uses. This public nature of the function of furnishing gas for public and private illumination is reaffirmed in many decisions, not only by way of illustration but by direct determination. The limitations upon the right of a gas company to maintain its pipes in public ways has been frequently adverted to. *Natick Gas Light Co.* v. *Natick*, 175 Mass. 246. *Boston Electric Light Co.* v. *Boston Terminal Co.* 182 Mass. 397. *Boston Electric Light Co.* v. *Boston Terminal Co.* 184 Mass. 566, 570. *Cheney* v. *Barker*, 198 Mass. 356. See *Twin Village Water Co.* v. *Damariscotta Gas Light Co.* 98 Maine, 325; *State* v. *New Orleans Gas Light Co.* 108 La. 67; *Haugen* v. *Albina Light & Water Co.* 21 Ore. 411; *Charleston Natural Gas Co.* v. *Lowe*, 52 W. Va. 662; *Miller* v. *Wilkes-Barre Gas Co.* 206 Penn. St. 254; *People* v. *Union Gas Co.* 254 Ill. 395; *McCarter* v. *Vineland Light & Power Co.* 3 Buch. 703. As is pointed out in *Weld* v. *Edison Electric Illuminating Co.* 197 Mass. 556, the policy which has been developed in Massachusetts respecting the furnishing of artificial light is regulated monopoly. This is an advantage accruing to the defendant beyond and in addition to those enjoyed at the time its charter was granted. A public service or *quasi* public corporation is one private in its ownership but having an appropriate franchise from the State to provide for a necessity or convenience of the general public incapable of being furnished through the ordinary channels of private competitive business and dependent for its exercise upon eminent domain or some agency of government. The character of the functions performed by a gas company, which is reflected in the evolution of the statute law, based upon common experience and the progress of civilization, stamps gas companies as

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public in the same sense in which these words are used in reference to street railways and like corporations. On basic principles, it cannot sell or mortgage its property so as to impair in any substantial degree its ability to continue to perform its public service, without legislative consent. *Commonwealth* v. *Smith*, 10 Allen, 448.

It remains to inquire whether the Legislature has granted permission to the defendant to make such a sale as it here contemplated. St. 1886, c. 346, was entitled "An Act in relation to gas companies." Section 4 of that act (now R. L. c. 121, § 13) provided that "no gas company shall transfer its franchise, lease its works, or contract with any person, association or corporation to carry on its works, without the authority of the Legislature." It is necessary in view of this statute to determine the meaning of "franchise" as there employed. Its definition depends upon the connection in which it occurs and the property and corporation to which it is applied. It may have different significations. The power to exist as a corporation with the special privileges and immunities personal to the particular organization is a franchise. This in its nature is not transmissible. The Legislature could not have used the word in this sense in the statute. As applied to a gas company, "franchise" means the right to manufacture and supply gas for a particular locality and to exercise the special rights and privileges in the streets and elsewhere which are essential to the proper performance of its public duty and the gain of its private emoluments and without which it could not exist successfully. *Memphis & Little Rock Railroad* v. *Railroad Commissioners*, 112 U. S. 609, 619. *Vicksburg* v. *Vicksburg Waterworks Co.* 202 U. S. 453, 464.

Without narrating all the facts set out in the record it is enough to say that Stone and Webster acquired all the stock and bonds of the defendant and, for the purpose of avoiding and adjusting certain financial and legal difficulties existing between the defendant, the city of Haverhill and the board of gas and electric light commissioners, organized a new corporation of which they held all the stock and, after making an arrangement approved by the city officers of Haverhill as to price of gas and receiving what purported to be street locations granted to the new corporation, proposed to transfer all the tangible physical properties of

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the defendant to the new corporation. Technically the defendant did not propose to sell or transfer to the new corporation its licenses to maintain pipes or to carry on the gas business or anything more than its tangible physical property. It is plain, however, from all the circumstances that what the defendant proposes to do is to transfer all its tangible and physical property to the new corporation for the sole purpose of enabling the latter to exercise all the franchises except that to be a corporation which it has heretofore exercised. The contention is that it does not undertake to sell or transfer any of its franchises but to surrender them. Practically, however, it is a surrender for the sole benefit of the new corporation and for the purpose of enabling it to use all the property and exercise all the franchises (except that to exist as a corporation) which the defendant has exercised heretofore. The policy of the State respecting gas companies having been fully established as that of regulated monopoly, it is plain that the new company except under most extraordinary circumstances could secure no street rights and no license which would enable it to exercise the franchises heretofore exercised by the defendant save by the latter's surrender of all its rights. Looking through form to substance, the proposed arrangement is the wiping out of the defendant and the substitution for it of the new corporation in the exercise of all its public duties, to be accomplished as parts of a single transaction. In essence it is the same as a consolidation or direct sale so far as concerns its practical manifestations in service to the public.

A public service corporation by accepting the rights and privileges conferred by its act of incorporation and by entering into the enjoyment of its franchises undertakes to perform all the public duties required of it. Under the circumstances here disclosed, it cannot surrender its franchises nor disable itself from the performance of its public functions without the consent of the Legislature. *Lumbard* v. *Stearns*, 4 Cush. 60, 62. *Turner* v. *Revere Water Co.* 171 Mass. 329, 334. *Mount Hope Cemetery* v. *Boston*, 158 Mass. 509, 522. *Braslin* v. *Somerville Horse Railroad*, 145 Mass. 64, 67. *Railroad Co.* v. *Brown*, 17 Wall. 445, 450. *Union Trust & Savings Bank* v. *Kinloch Long Distance Telephone Co.* 258 Ill. 202. It is hardly necessary to say that there is nothing at variance with this principle in *Selectmen of Amesbury* v. *Citizens*

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Electric Street Railway, 199 Mass. 394. It was assumed as the basis of the opinion in *Weld* v. *Gas & Electric Light Commissioners*, 197 Mass. 556, 560, that a gas company could not by any corporate act impair its service and that mandamus would lie against a gas company "for a failure properly to exercise its corporate franchise." So far as there is anything inconsistent with this in *East Ohio Gas Co.* v. *Akron*, 81 Ohio St. 33, we are not disposed to follow it. A surrender of its franchise for the benefit of the new corporation in the way proposed on this record is the equivalent of a transfer of its franchise as those words are used in R. L. c. 121, § 13. The scheme proposed is an evasion of the statute. The Legislature clearly has granted no consent to the transfer but has prohibited it. The surrender of the charter is not a separate matter, but an incident of the plan to circumvent the plain intent of the statute. See *Miller & Lux, Inc.* v. *East Side Canal & Irrigation Co.* 211 U. S. 293; *Southern Realty Investment Co.* v. *Walker*, 211 U. S. 603.

It is argued strongly that *Evans* v. *Boston Heating Co.* 157 Mass. 37, is a controlling authority in favor of the defendant. That case related not to a gas company but to a corporation organized for supplying hot water for heating, cooking and mechanical purposes, an experimental venture which failed. It did not refer to St. 1886, c. 346, and did not need to do so. The opinion does not discuss with thoroughness the public service aspect of gas companies. Hence it is not a binding authority and we are not disposed to extend its reasoning to such companies.

Even if it be assumed that this decision would be a conclusive authority in favor of the defendant but for St. 1886, c. 346, § 4, R. L. c. 121, § 13, as has been shown, we interpret that statute as prohibiting such a sale as is contemplated in the case at bar. The statute as so interpreted is constitutional. It is difficult to define within exact limits the power of the Legislature over public service corporations. A corporation like a gas company, dependent for the conduct of its business upon a license to use in part the highways, (its rights in which are acquired avowedly for a public use,) is something more than affected with "a public interest." Its business is public not only in the sense that it is obliged to sell to the public without discrimination, but it is confessedly public in its nature, because employing an agency purchased at the expense of the tax-

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payers and hence solely for public purposes, for the distribution of its product through pipes. Where a corporation, as an essential element of its existence, enjoys and uses privileges in the public streets such as it could not exercise save in the performance of a public duty, and enjoys these privileges as licensee and without any paramount or exclusive right therein, plainly it is subject in this respect to a considerable degree of legislative control and regulation, to be exercised with regard both to the public interests and private property rights of the corporation. A licensee who has exclusive use under legislative permission of a part of a highway for the performance of a public duty, may be forbidden to make, without legislative permission, any sale of property devoted under such circumstances to such uses, involving as it would certain rights in streets. When no contract has arisen, public policy may be changed within reasonable limits in this respect without the violation of any provision of the state or federal constitution. It is not necessary to define with precision under what branch of the authority of the Legislature this may be done, whether in the exercise of the police power in determining who may have special privileges in the public ways, or under the power of amendment, alteration or repeal of corporate charters reserved by R. L. c. 109, § 3, or in the exercise of its general power of control over public service corporations. The statute may be sustained, probably, in the exercise of the general power of the State over its highways. *Fair Haven & Westville Railroad* v. *New Haven*, 203 U. S. 379. *West Chicago Street Railroad* v. *Chicago*, 201 U. S. 506. In any event it is a valid exercise of the reserved power of the Legislature to amend corporate charters. It is well within the principle stated with ample reasoning in *Commissioners on Inland Fisheries* v. *Holyoke Water Power Co.* 104 Mass. 446, 451; *S. C.* sub nom. *Holyoke Co.* v. *Lyman*, 15 Wall. 500. *Close* v. *Glenwood Cemetery*, 107 U. S. 466. *Berea College* v. *Kentucky*, 211 U. S. 45. *Stanislaus County* v. *San Joaquin & King's River Canal & Irrigation Co.* 192 U. S. 201. *Parker* v. *Metropolitan Railroad*, 109 Mass. 506. *Metropolitan Railroad* v. *Highland Street Railway*, 118 Mass. 290. *Selectmen of Norwood* v. *New York & New England Railroad*, 161 Mass. 259. *Brownell* v. *Old Colony Railroad*, 164 Mass. 29. *Revere Water Co.* v. *Winthrop*, 192 Mass. 455, 464. The statute in question does not impair the object for which the

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franchise was granted, but rather tends to insure its continuance. Neither the state nor the federal constitution can be invoked "to protect property from a congenital defect." *Madera Water Works* v. *Madera*, 229 U. S. 454.

Decree for the informant.

ALONZO W. PERRY *vs.* CHARLES E. PYE & others.

Suffolk. May 19, 1913. — June 17, 1913.*

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DE COURCY, JJ.

Equity Pleading and Practice, Bill, Issues for jury, Master's report. *Bills and Notes. Evidence*, Admissible for a limited purpose. *Equity Jurisdiction*, Acquired for one purpose retained for all, Equitable set-off against judgment in action at law.

The objection that a bill in equity is multifarious can be raised only by assigning this cause of demurrer, and is waived by a demurrer which does not contain such an assignment.

In a suit in equity, where a defendant, who was made a party after the presentation by a master of the draft of his report, after the filing of the master's report makes a motion for the framing of issues for a jury, if it appears that this defendant before he became a party had appeared before the master, both as counsel and as an important witness in support of his alleged rights, and that the case was tried fully on its merits before the master, the denial by the trial justice of such defendant's motion to have issues framed for a jury is a proper exercise of judicial discretion.

In a suit in equity, exceptions to a master's report, relating to questions of fact on which the evidence, amply reported, was conflicting and irreconcilable, here were overruled, because the master's findings to which the exceptions related were not shown plainly to have been erroneous.

In this Commonwealth the holder of a promissory note indorsed in blank by the payee may sue upon it in his own name, although as between himself and the indorser he may be bound to account wholly or in part for the proceeds.

In a suit in equity founded on a promissory note signed by the defendant as maker, which was indorsed in blank by the payee and was delivered by him to the plaintiff after its maturity, it appeared that the maker of the note signed it in blank and placed it in the hands of an agent with authority to fill in the amount and the date and deliver the completed instrument to the payee in renewal of a former note, and there was evidence that this authority was exercised by the agent within a reasonable time and in good faith, and was not exceeded.

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* This case is printed out of its order by reason of a temporary withdrawal of the opinion.

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It appeared that the note was governed by the law of Canada, and that by the law of that Dominion, as proved, the note under these circumstances was binding on the maker. An exception to a finding by a master that the note was binding on the defendant was overruled.

A self-serving statement, which in itself would be inadmissible but which is material for the purpose of showing the date at which the assertion contained in it was made, properly may be admitted in evidence if its consideration is limited strictly to the single purpose for which it is material.

If a master in a suit in equity makes a ruling of law upon a question which he properly might have declined to pass upon and have left for the trial justice, yet, if his ruling is right, an exception to it will not be sustained.

The well-established principle here was applied, that where a court of equity has jurisdiction of a suit for one purpose it will, if justice so requires, exercise it for any purpose within the scope of the bill.

The doctrine of set-off, applied by statute to actions at law, had its origin in courts of equity, where the power to compel a set-off of cross demands or of judgments has been exercised whenever necessary for the proper administration of justice.

In a suit in equity by the holder of a promissory note made by the defendant, who was not an inhabitant of this Commonwealth, seeking to have the amount due on the note set off against any judgment that the defendant might recover against the plaintiff in a pending action at law, where the defendant did not set up by demurrer or answer the defense that the plaintiff had an adequate remedy at law, it appeared that the defendant was a non-resident and was insolvent and it was not shown that the defendant was possessed of or entitled to any interest in real or personal property which could be seized on execution at law or reached in equity. *Held*, that the plaintiff was entitled to have the decree in the present suit set off against any judgment that might be obtained against him in the action at law, subject to the rights of a third person who had brought an action at law against the defendant by trustee process and had summoned the plaintiff as trustee.

BILL IN EQUITY, filed in the Superior Court on March 4, 1912, removed to the Supreme Judicial Court on March 21, 1912, and amended in that court on April 12, April 26 and October 1, 1912, by the holder of a promissory note for $9,759.92 dated April 7, 1910, made by the defendant Pye payable to the order of James A. Farquhar and indorsed by Farquhar in blank, seeking to have the amount due on the note set off against any judgment which the defendant Pye, who was not an inhabitant of this Commonwealth, might recover in a pending action at law brought by him against the plaintiff, and seeking also to reach and apply under R. L. c. 159, § 3, cl. 8, to the payment of the note an alleged interest of the defendant Pye in a claim against the defendant Canada, Atlantic and Plant Steamship Company, alleged to have been fraudulently assigned by the defendant Pye to the defendant Young with intent to defeat, delay and defraud the creditors of

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the defendant Pye. It was agreed by a stipulation of the parties that the plaintiff obtained the note after its maturity and acquired no greater rights than Farquhar had.

The facts in regard to the joining of the defendant Daggett as a party and in regard to his demurrer to the bill are stated in the opinion. The defendant Daggett, without waiving his demurrer, also made a motion for the framing of issues for a jury. The demurrer was overruled by *De Courcy*, J. He also denied the motion for the framing of issues for a jury. The defendant Daggett appealed from the interlocutory decree overruling the demurrer and from the order denying his motion.

Before the defendant Daggett was made a party, the case had been referred to Starr Parsons, Esquire, as master. Among other findings, the master found that Perry, the plaintiff, was the legal, although not the beneficial, owner of the note, and that he had such legal rights as Farquhar had on February 24, 1912; that he had the right to set off any amount which might be found to be due to him in this suit against the judgment in the case of Pye *v.* Perry, subject to all claims which had become vested in the proceeds of the judgment in that case before February 24, 1912. The master found that the suit was brought for Farquhar's benefit at Farquhar's expense; that the note was signed in Massachusetts and was mailed in Massachusetts to Boak, mentioned in the opinion, in Halifax, Nova Scotia, with authority for Boak to complete it in Nova Scotia and deliver it to Farquhar. In order to have the question determined, the master ruled that the note was not a Massachusetts contract, and was governed by Canadian law so far as any question arose as to its validity, form or interpretation. At the request of the parties the master reported certain sections of the Canada bill of exchange act. The master found that there was no fraudulent purpose in the assignment by the defendant Pye to the defendant Young. There was evidence in regard to an assignment to the defendant Daggett, which assignment the master found had been waived and abandoned.

Other facts found by the master are stated in the opinion.

In conclusion the master found that the plaintiff was entitled to recover the amount of the note of April 7, 1910, namely, $9,759.92, with interest at the rate of six per cent per annum, against the defendant Pye, and found that he was entitled to set off the claim

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against the claim in the case of Pye *v.* Perry, subject to any equities in said claim which became vested before February 24, 1912. He found in favor of the defendant Young, and found that the proceeds of the judgment against the defendant Canada, Atlantic and Plant Steamship Company were to be distributed $545 to the defendant Young, $850 to Francis P. Garland, Esquire, as counsel fees, and the balance to the defendant Daggett.

Exceptions to the master's report were filed.

There was a hearing before *Morton*, J., who made the following findings in regard to the claim of the defendant Hall:

"This case was sent to a master, and, on the coming in of his report, the plaintiff and the defendant Pye filed exceptions thereto. The defendant Young filed objections to the report, and later he also filed exceptions. After the hearings before the master had been concluded and his report had been drafted, but before it had been filed, the plaintiff moved to amend his bill by making Frederick J. Daggett of Winthrop, Mary J. Hall of Boston, Mary J. Tape of Waltham, James A. Young of Newton, Alfred S. Hayes of Hopkinton and James A. Bussey of Boston, all in this Commonwealth, parties defendant. This motion was allowed against the objection of the defendant Pye, and without, so far as appears, any notice thereof having been given to the defendant Young. The defendant Daggett appeared and demurred to so much of the bill as sought for a set-off of executions. He also answered without waiving his demurrer. The defendant Hall duly appeared and answered. The other parties who were summoned have not appeared. The case came on for hearing before me in reference, amongst other things, to the claim of the defendant Hall, and I proceeded to hear the same instead of sending the case back to the master. The defendants Pye and Young contended that under the present bill and the amendment, especially in view of the fact that the master had found that the assignment from Pye to Young was made in good faith, and was not in fraud of creditors, and there was consequently nothing to reach and apply under the bill, that the issue whether the defendant Hall was entitled to share in the proceeds of the judgment of Young *v.* The Canada, Atlantic and Plant Steamship Co., and if so, to what extent, was not properly before the court. I did not pass upon this contention, nor upon how much, if anything, was due the defendant Hall

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from the defendant Pye at the date of the assignment to the defendant Young on March 19, 1909; nor upon how much, if anything, was due the defendant Daggett, leaving those matters to be determined hereafter in such manner as to the court might seem meet, if it appeared that they required to be determined. The said Daggett was not a witness before me, and no hearing was had by me, and no finding is made by me in regard to the issues raised by his answer. I found the following facts, if material and competent, in regard to the claim of the defendant Hall:

"It appeared and I found that Pye's former wife [the defendant Hall] had obtained a divorce from him, with alimony, which had not been paid by him. She brought an action at law against him to recover the arrears of alimony, in which Perry was summoned as trustee, and obtained judgment and took out execution. Pye desired to attend as a witness the trial of the two actions brought by him, but could not for fear of being arrested on the execution which had been issued against him in the suit by his former wife. He also desired to remove his residence to Massachusetts, in order that he might go into business here. Pye had made an assignment to Mr. Young of all claims which he might have against the steamship company. This assignment, though made to Young, was in reality for the benefit of Mr. Daggett, who was acting as Pye's counsel, but who, for good and sufficient reasons, did not care to take the assignment in his own name. In order to enable Pye to attend as a witness in the actions that had been brought by him or for his benefit and against him, it was agreed between Mr. Daggett and Mr. Young, representing Pye, and Mr. McCarthy, representing Mrs. Hall, that the proceeds of the action against the steamship company, after deducting attorney's fees and disbursements, should be divided between Daggett and Young and Mrs. Hall in proportion to their respective claims. The consideration for this agreement on Mrs. Hall's part was an undertaking by her that during the pendency of said actions she would not arrest Pye, or cause him to be arrested on execution, or otherwise molest him while he was in Massachusetts, either for the purpose of attending court as a witness in the actions brought by or for him or for other purposes. And this agreement or undertaking she faithfully performed. I find that Mr. Daggett and Mr. Young had authority to enter into the agreement on behalf of Mr. Pye,

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that it was founded on a good and sufficient consideration, and that under and pursuant to it Mrs. Hall is entitled to a proportionate share of the proceeds of the suit against the steamship company when the judgment which has been rendered against it has been collected.

"I make these findings subject, as I have said, to the contentions of the defendants Pye and Young that they are not competent or material, and leaving that question open, without making any ruling upon it. In the course of the hearing before me certain statements were testified to as having been made by Mr. Daggett in regard to the amount of his claim against Pye at the time when Mr. Young and he made the arrangement which they did with Mrs. Hall. What effect, if any, should be given to those statements in determining the amount of Mr. Daggett's claim against Pye I did not, and have not, considered, for the reason, as I have said, that I did not undertake to determine or pass upon the amounts, respectively, of Mrs. Hall's claim and of Mr. Daggett's claim, but left them to await the determination of the question whether Mrs. Hall's claim can be enforced in this proceeding.

"I further found, if competent and material, that in addition to the action brought by Young, for the benefit of Pye, against the steamship company, an action had been brought by Pye against Perry, the present plaintiff, in which a verdict has been rendered in Pye's favor for a large amount, but, owing to the pendency of exceptions, judgment has not been entered on the verdict. As I have previously said, suit was brought by Mrs. Hall against Pye to recover arrears of alimony, and Perry was summoned as trustee. The trustee was defaulted, but a motion is pending to remove the default. The judgment obtained by Mrs. Hall against Pye has been in no part satisfied."

Later, the case came on to be heard before *De Courcy*, J., who, at the request of the parties, reserved it for determination by the full court upon the bill and answers, the master's report, and the exceptions thereto, the appeals of the parties from any interlocutory decree, the motion of the defendants Pye and Young for a final decree upon the facts found by the master, the findings of *Morton*, J., in reference to the claim of the defendant Hall, together with the questions of the materiality and

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competency of the facts so found, and the question whether the rights of the defendant Hall could be settled under this bill as amended. If for any reason the status of the case was such that it could not now be finally disposed of, the justice reported it under and by virtue of R. L. c. 173, § 105. The report was made without prejudice to the plaintiff's right to move for a marshalling of assets by the defendants Hall and Daggett.

Other cases between some of the parties to this suit are reported in 211 Mass. 453, 212 Mass. 525, and *ante*, 296.

The case was submitted on briefs.

A. M. Lyman, for the defendants Daggett and Pye.

W. R. Bigelow & J. E. Young, for the defendant Young.

J. E. Hannigan & I. Fox, for the plaintiff.

BRALEY, J. The original bill and the bill as amended are framed with a double aspect. If the plaintiff's debt is established he asks in the second paragraph that an equitable set-off be made of any judgment which the defendant Pye may recover against him in a pending action at law; while in the third, fourth and fifth paragraphs he seeks to reach and apply in payment the amount of a judgment recovered by this defendant against the steamship company. The defendant Daggett did not become a party until the master to whom the case was referred had prepared his draft report, and the plaintiff thereupon had amended the bill by joining as defendants all parties interested in an assignment of the claim against the company, given by Pye to the defendant Young. It is true as to the defendant Daggett that by the allegations he is connected only with the claim set forth in the third paragraph. But his demurrer is not on the ground that the bill is multifarious. If he did not care to raise this question, he cannot avail himself of possible objections to the misjoinder of causes and the prayers for relief which do not concern him, but affect only the defendant Pye, who has answered generally. *Davis* v. *Peabody*, 170 Mass. 397. The demurrer was rightly overruled.

The master's report having come in, it was disclosed that the defendant Daggett held an assignment from Pye of the claim against the plaintiff described in the second paragraph, and that he also was interested and protected as a creditor of Pye under the assignment to the defendant Young. It further appears that before he became a party he had appeared before the master, both as coun-

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sel and as an important witness in support of his alleged rights, where the case was fully tried upon the merits, and that he has no interest in the litigation except as an assignee. The order under these circumstances denying his motion to have issues framed for a jury having been within the discretion of the single justice, it should be affirmed, even if it is reviewable on appeal. *Jones* v. *Keen*, 115 Mass. 170, 180. *Ginn* v. *Almy*, 212 Mass. 486, 494.

We pass to the exceptions to the master's report. It contains copious recitals of the evidence, with a full statement of the respective claims of the parties, which are shown to have been exhaustively contested. A careful perusal, however, is insufficient to show plainly that the master's findings of fact, based upon irreconcilable testimony, are erroneous, and all of the exceptions which depend upon a reversal of his conclusions must be overruled. *Ginn* v. *Almy*, 212 Mass. 486.

The exceptions to the master's rulings and the nature of the decrees to be entered upon the report, are left for decision.

The plaintiff acquired the promissory note in suit by the indorsement of one Farquhar, the payee, and, having been vested with the legal title, he can sue in our courts in his own name, although as between himself and the indorser he may be bound to account partially for the proceeds. R. L. c. 73, § 16. *Jump* v. *Leon*, 192 Mass. 511, 513, 514. But, the note having been indorsed after maturity, it is contended that the defendant Pye, who is the maker, never became bound, as the delivery of the instrument to the payee was unauthorized. The master's finding, that one Boak, with whom this defendant had left the note signed in blank, had been clothed with authority to fill in the amount with the date and to deliver the completed instrument to the payee in renewal of a former note, is conclusive, even if, as the defendant urges, the payee knew that Boak was an agent, and more than one inference could have been drawn from the evidence.

The transaction took place in Canada and is governed by the foreign law, put in evidence. *Glidden* v. *Chamberlin*, 167 Mass. 486. *American Malting Co.* v. *Souther Brewing Co.* 194 Mass. 89. The Canada bills of exchange act, St. of Canada, 53 Vict. 1890, c. 33, § 20, provides that "where a simple signature on a blank paper is delivered by the signer in order that it may be converted into a bill, it operates as a *prima facie* authority to fill it up as a com-

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plete bill for any amount, using the signature for that of the drawer, or the acceptor, or an indorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a *prima facie* authority to fill up the omission in any way he thinks fit. In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given; reasonable time for this purpose is a question of fact." The inferences to be drawn from the evidence were questions of fact, and the findings that under all the circumstances the defendant's agent had acted within a reasonable time, in good faith, and had not exceeded his authority, even if the face of the note was slightly less than the amount actually due, left the note a valid undischarged obligation of the defendant. See *Ives* v. *Farmers' Bank*, 2 Allen, 236; *Boston Steel & Iron Co.* v. *Steuer*, 183 Mass. 140, 146; *Lloyd's Bank, Limited*, v. *Cooke*, [1907] 1 K. B. 794.

In this connection the admission in evidence of the carbon copy of a letter to the payee from his son, to whom, while abroad, he apparently had entrusted the procurement of the note, is to be noticed. The letter stated that the son had received the note from Boak, filled in as the payee desired. The original had been lost or destroyed and could not be produced. Of itself the copy would have been in the nature of self-serving declarations and inadmissible. But the defendants insisted that the note in suit was a "recent contrivance" to avoid the statute of limitations, because the letters of Boak to the defendant Young substantially stated that the debt had become outlawed before the note was delivered. To meet this specific defense, to which it is strictly limited by the master, the evidence was competent.

It is difficult to see upon what ground the further defense of failure of consideration rests. No contention is made that any part of the original loan had been repaid to Farquhar, and the subsequent bill in equity to collect the note, having been discontinued without prejudice, could not operate either as payment or satisfaction. The master upon his findings correctly ruled that there had been no failure of consideration.

The assignment to Young having been found valid, the proceeds of the judgment against the steamship company would be ex-

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hausted upon distribution among the creditors for whose benefit it had been given, and the bill fails in so far as it seeks to reach and apply any part of this fund in payment of the plaintiff's debt. *Hoshor-Platt Co.* v. *Miller*, 190 Mass. 285, 287. It also results that the claims of the creditors who have been made parties defendant, including the defendant Hall, whose right to participate was heard and allowed by a single justice, and the proportionate part which each should receive, cannot be determined in this suit. *Union Trust Co.* v. *Reed*, 213 Mass. 199, 202.

Nothing is now left but the controversy over the right to set off the plaintiff's debt, under paragraph two, which has been established by the master. It is stated in the report that in accordance with the fourth prayer of the bill an injunction issued which is still in force, enjoining the defendant during the litigation from assigning or incumbering his claim, and, while a large verdict has been obtained in the action at law, that case is pending on exceptions taken by the present plaintiff. It was undisputed that the defendant Daggett's assignment antedated the plaintiff's title to the note; but it was a question of fact whether the assignment had been waived or cancelled by the mutual consent of the parties. *Metropolitan Coal Co.* v. *Boutell Transportation & Towing Co.* 185 Mass. 391, 397.

It appears that, after the master had prepared his draft report, at the request of counsel for Mr. Daggett he reopened the case for the taking of further evidence upon this question, but neither Daggett nor Pye have been harmed by the exclusion of certain questions in the redirect examination of Daggett relating to the security upon which he relied for repayment of advances made and professional services rendered to Pye, and whether he knowingly intended to surrender the assignment or to waive any rights under it. The entire matter, as the witness himself said, had been exhaustively covered by his previous testimony, which he did not desire to change, and the legal effect of what he voluntarily had done was for the determination of the master and not for the judgment of the witness. The defendant Pye contends that, although the master found that the assignment had been cancelled, he was without authority to pass upon the question of set-off. It might have been reserved for the court, but if the ruling allowing the set-off is right, an exception will not be sustained.

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The defense that the remedy at law is adequate has never been pleaded by the defendant Daggett to any aspect of the bill, yet he urges, that upon the master's report no case is made out for equitable relief, and that the court has no jurisdiction to decree a set-off. The objection to the jurisdiction comes too late. The well established rule is that if the court has jurisdiction for one purpose, it will, where justice requires, exercise it for any purpose within the scope of the bill. *Dearth* v. *Hide & Leather National Bank*, 100 Mass. 540, 543. *American Stay Co.* v. *Delaney*, 211 Mass. 229, 233. *Earl of Oxford's case*, 2 White & Tudor's Lead. Cas. in Eq. (4th Am. ed.) 1291, 1347, 1348, 1349. *Stratton* v. *Hernon*, 154 Mass. 310.

It is apparent from the report that the plaintiff succeeded to the rights of the payee at the date of the transfer, and by cancellation of the assignment, no intervening equities are shown to prevent an offset as in *Ames* v. *Bates*, 119 Mass. 397, 399. It is unnecessary to decide whether the note could have been pleaded under the R. L. c. 174, providing for the set-off of mutual demands due at the date of the writ, or whether, as the defendant was a non-resident, there was a remedy by a cross action and a set-off of judgments under R. L. c. 170, § 2, or whether, notwithstanding the assignment, the executions could have been set off under R. L. c. 177, § 27. See *Porter* v. *Leach*, 13 Met. 482; *Fiske* v. *Steele*, 152 Mass. 260; *Aldrich* v. *Blatchford*, 175 Mass. 369; *Franks* v. *Edinberg*, 185 Mass. 49. The doctrine of set-off, while not recognized at common law, had its origin in equity, where the power to compel a set-off of cross demands or of judgments has been exercised whenever necessary for the proper administration of justice. *Stone* v. *Old Colony Street Railway*, 212 Mass. 459, 466. *Holbrook* v. *Bliss*, 9 Allen, 69, 77. *Abbott* v. *Foote*, 146 Mass. 333. *Crummett* v. *Littlefield*, 98 Maine, 317. *Earl of Oxford's case, supra.* If, as a general rule, where statutes of set-off have been enacted, equity will follow the construction adopted by courts of law, no express provision for a set-off of a decree for injunctive relief and for money damages in equity against a judgment at law is found in our statutes. *Jump* v. *Leon*, 192 Mass. 511, 516. *Chipman* v. *Fowle*, 130 Mass. 352. *Spaulding* v. *Backus*, 122 Mass. 553, 554. *Black* v. *Whitall*, 1 Stockton, 572. *Bell* v. *Ward*, 10 R. I. 503, 506. And in *Holden* v. *Gilbert*, 7 Paige, 208, 212, on a bill in equity to

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foreclose, a judgment at law in favor of the defendant was held to be the subject of a set-off against a decree in favor of the plaintiff for the sale of mortgaged premises to satisfy the debt and costs due to the latter. The non-residence of the plaintiff Pye and his insolvency are material facts and properly may be considered. *Lindsay* v. *Jackson*, 2 Paige, 581. *Tone* v. *Brace*, 8 Paige, 597. *Hendrickson* v. *Hinckley*, 17 How. 443, 446, 447. A set-off will not operate unjustly upon any party to the case. It is within the spirit, if not the letter, of our statutes relating to set-off. The defendant is not shown to be possessed of, or entitled to, any interest in real or personal property which can be seized on execution at law or reached in equity, and upon the record it is the only way in which the plaintiff can obtain any pecuniary satisfaction. Under such conditions relief may be decreed. *Spaulding* v. *Backus*, 122 Mass. 553. *North Chicago Rolling Mill Co.* v. *St. Louis Ore & Steel Co.* 152 U. S. 596.

Nor is the exercise of this right defeated by the facts found by the single justice, to whom the claim of the defendant Hall was submitted. By the affirmative averments in her answer she submits herself to the jurisdiction of the court and asks that independently of her interest as a creditor of Pye under the assignment to Young her rights may be established and protected in the action by trustee process she had brought against Pye and the plaintiff in the Superior Court, where she has obtained judgment and taken out execution, although, the trustee having been defaulted, a motion was pending to remove the default. It being certain that all parties in interest are before the court, full relief, according to the requirements of the R. L. c. 189, § 25, that "a trustee may retain or deduct from the goods, effects or credits in his hands all demands against the defendant of which, had he not been summoned as a trustee, he could have availed himself by way of set-off on a trial or by the set-off of judgments or executions between himself and the defendant, and he shall be liable for the balance only after all mutual demands, . . . have been adjusted," can be administered, to avoid circuity of action and needless litigation. If the exceptions are overruled and judgment is entered on the verdict for the plaintiff Pye, this court, after the rights of the parties have been settled under the lien of the attachment in the action brought by Hall, can set off the amount of the decree against the

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judgment and award execution for the difference, if any, which may be due, to the plaintiff; or, if the balance is found in favor of the defendant Pye, he may be decreed to have execution therefor in the court where the judgment was entered.

We are therefore of opinion that a decree should be entered affirming the orders appealed from, overruling the exceptions to and confirming the report, denying the motions of the defendants Pye and Daggett for a final decree in their favor, and dismissing the bill with costs as to all the remaining defendants, except the defendant Hall. The decree is also to contain a clause that the assignment to the defendant Daggett has been cancelled by the parties and enjoining him from seeking to enforce any claim thereunder. But as to the defendants Pye and Hall the case is to stand for further proceedings before a single justice.

Ordered accordingly.

WILLIAM M. STOCKBRIDGE *vs.* J. FRANK MIXER & others.

Suffolk. March 20, 1913. — June 18, 1913.*

Present: RUGG, C. J., MORTON, LORING, SHELDON, & DE COURCY, JJ.

Equity Jurisdiction, To reach and apply equitable assets. *Constitutional Law,* Right to trial by jury. *Equity Pleading and Practice,* Claim of jury. *Rules of Court. Jury.*

A suit in equity under R. L. c. 159, § 3, cl. 7, to reach and apply equitable assets to the payment of a debt alleged to be due to the plaintiff, which has not been reduced to a judgment, combines in substance a proceeding at law to establish the debt with a separate proceeding in equity for the collection of the debt when established, and upon the issue of the existence of the debt the defendant has a constitutional right to a trial by jury.

In a suit in equity under R. L. c. 159, § 3, cl. 7, to reach and apply equitable assets to the payment of a debt alleged to be due to the plaintiff, which has not been reduced to a judgment, the time for claiming a trial by jury upon the issue of the existence of the debt is governed by Superior Court Equity Rule 36, which requires that "the application shall be filed within ten days after the parties are

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at issue" unless otherwise ordered by the court; and, where the plaintiff files a replication, the parties are not at issue within the meaning of the rule until such replication is filed.

BILL IN EQUITY, filed in the Superior Court on December 9, 1909, and amended on January 26, 1911, by an attorney at law under R. L. c. 159, § 3, cl. 7, to reach and apply, to the payment of a debt for professional services alleged to be due to the plaintiff from the two first named defendants, the interest of those defendants in certain property which could not be attached or taken on execution in an action at law.

The dates of filing of the answers to the amended bill, of the plaintiff's replication and of the motion of the two first named defendants that they might be allowed a trial by jury are stated in the opinion. The case was referred to a master. After the filing of the master's report, the case was heard by *Pierce*, J., on a motion of the two first named defendants to set aside the master's report, discharge the order of reference and frame issues for a jury. The judge ruled that this motion must be granted as a matter of law; that the defendants had a constitutional right to a jury trial and had not lost or waived it; and, being of opinion that this ruling so affected the merits of the controversy that the matter ought, before further proceedings, to be determined by this court, at the request of the plaintiff reported the case for that purpose, including the docket entries but excluding the master's report, the objections and exceptions thereto and a motion to recommit.

Superior Court Equity Rule 36, referred to in the opinion, is as follows: "Whenever it is necessary or proper to have any fact tried and determined by a jury, the court will direct an issue for that purpose, to be framed by the parties, containing a distinct affirmation and denial of the points in question, or in such form as the court shall order; and the issue thus framed and joined shall be submitted to a jury, and be tried upon the like evidence as in an action at law, together with such part of the answers, depositions, and other proceedings in the cause as the court shall direct. When issues are desired in a suit in equity, the application shall be filed within ten days after the parties are at issue; but in either case the court may extend or restrict the time."

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J. J. Higgins, (*A. A. Gleason* with him,) for the defendants J. Frank and William A. Mixer.

G. W. Anderson, (*W. M. Stockbridge* with him,) for the plaintiff.

RUGG, C. J. This is a suit in equity under R. L. c. 159, § 3, cl. 7. The plaintiff alleges a debt due to him from two of the defendants for services rendered, which has not been reduced to a judgment. He seeks to reach and apply in payment of this debt an interest owing to the principal defendants from the third defendant, which cannot be attached or seized in an action at law.

The first question is whether the defendant debtors are entitled as matter of right to a trial by jury. The nature and history of the relief afforded by clause 7 is set out at length in *Pettibone* v. *Toledo, Cincinnati, & St. Louis Railroad*, 148 Mass. 411. It there was held that the purpose of the statute was not to create a jurisdiction over "a 'creditor's bill,' in the sense in which those words are used in the practice of courts of chancery." Speaking generally, such a bill (except where the estate of a deceased person was involved) could be brought only by a creditor who had secured a judgment at law and who was unable to obtain satisfaction of it, and must be instituted not only for himself but for all other creditors who might come in and be parties to the suit. Jurisdiction to entertain a bill, like that provided by clause 7, does not fall under any general head of equity jurisprudence. Hence it was not affected by the later statute conferring full equity jurisdiction. *Barry* v. *Abbot*, 100 Mass. 396. *Tucker* v. *McDonald*, 105 Mass. 423. The proceeding has been said to be "in the nature of an equitable trustee process, as distinguished from a creditors' bill." *Phœnix Ins. Co.* v. *Abbott*, 127 Mass. 558. The distinction between the special relief afforded by this clause of the statute and that arising under general equity jurisprudence has been referred to many times. *Carver* v. *Peck*, 131 Mass. 291. *Maguire* v. *Spaulding*, 194 Mass. 601, 604. *Chapman* v. *Banker & Tradesman Publishing Co.* 128 Mass. 478. *Geer* v. *Horton*, 159 Mass. 259. *Wilson* v. *Martin-Wilson Automatic Fire Alarm Co.* 151 Mass. 515, 517. *Weil* v. *Raymond*, 142 Mass. 206, 213. In other cases the remedy established by this statute has been said to be "not in itself a subject of equitable jurisdiction," *Hoshor-Platt Co.* v. *Miller*, 190 Mass. 285, 286, nor like "a creditors' bill under general equity practice," *Snyder* v. *Smith*, 185 Mass. 58, 62.

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This clause of the statute combines in a single proceeding two different matters or steps in procedure, one at law and the other in equity. The first is the establishment of an indebtedness on the part of the principal defendant to the plaintiff. The second is the process for collecting the debt, when established, out of property rights which cannot be reached on an execution. In essence the first is an action at common law and the second a well recognized head of relief in chancery. Under the circumstances disclosed in the case at bar the plaintiff's initial claim for services rendered by him to two of the defendants presents purely an action at common law. If the plaintiff fails in this respect his bill must be dismissed. If, however, he establishes the indebtedness, then he will be in position to take advantage of the second part of the statute, which relates solely to relief and which is equitable in its nature. The case falls midway between a creditor's bill as known in chancery and the relief afforded by R. L. c. 159, § 3, cl. 8, which as pointed out in *Powers* v. *Raymond*, 137 Mass. 483, combines in one suit in equity two essentially legal proceedings. As was demonstrated by the illuminating opinion in *Parker* v. *Simpson*, 180 Mass. 334, the Constitution preserves the right of trial by jury as it was understood and practised at common law, and therefore there is no constitutional right to such a trial respecting matters cognizable under the general principles of chancery. Nor does it exist as to rights gratuitously created by the Legislature. *Sawyer* v. *Commonwealth*, 182 Mass. 245. Where the right to trial by jury has the protection of the Constitution because connected with an action at common law, a party cannot be deprived of that right because a change in the form of procedure has made it cognizable in courts of equity. *Powers* v. *Raymond*, 137 Mass. 483. *Merchants' National Bank* v. *Moulton*, 143 Mass. 543. *Ginn* v. *Almy*, 212 Mass. 486, 495. It follows that in the case at bar the defendants are entitled to trial by jury respecting the debt alleged to be due from them to the plaintiff. They are not entitled to a trial by jury respecting the other branches of the case which relate to remedy and which are purely equitable in their nature.

It remains to inquire whether the defendants have waived that right. The facts are that the answer was filed on February 3, 1910. A motion for trial by jury was filed on October 28, 1910.

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An amendment to the bill was filed on January 26, 1911, and answer to the bill as amended on February 14, 1911. A replication was filed on February 20 and the claim for jury on February 28 of the same year. The parties were not at issue as those words are used in equity practice until the replication was filed. The claim for a jury trial was filed within the time allowed therefor under Superior Court Equity Rule 36. In a proceeding like the present, which rightly is brought under the statute on the equity side of the court, but which combines the establishment of a right at common law with relief afforded in equity, we think it more convenient and less confusing to hold that the procedure for asserting the right to trial by jury should follow the rules established in equity rather than at common law. This is not one of the cases where the formal replication was not filed and it is not necessary to determine within what time the right to a jury must be asserted in order to be preserved in such a case. See *Stratton* v. *Hernon*, 154 Mass. 310.

An issue for a jury is to be framed in accordance with this opinion. So much of the master's report as does not deal with this issue may stand. Whether the portion of it which deals with this issue should be treated as an auditor's report can be determined only on motion therefor made in the Superior Court.

So ordered.

EMELINE S. RICE *vs.* FREDERIC D. MERRILL.

Middlesex. March 26, 27, 1913. — June 18, 1913.*

Present: RUGG, C. J., MORTON, LORING, SHELDON, & DE COURCY, JJ.

Equity Pleading and Practice, Decree. *Equity Jurisdiction*, Control of trusts. *Superior Court. Trust*, Created by decree of court.

In a suit in equity by an aged widow, seeking to set aside a deed of property made by her to the defendant conditioned upon her comfortable support by the defendant during her lifetime, and containing a general prayer for further relief, the Superior Court may make an interlocutory decree ordering the defendant to convey to a certain person as trustee all the property conveyed to

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him by the plaintiff, to be held by such trustee for the benefit of the plaintiff upon trusts stated in the decree, and, upon the plaintiff's death, to apply any balance of the trust fund in his hands as therein directed in satisfaction of any just debts or expenses incurred under the trust, and to pay the balance then remaining to the plaintiff's executor or administrator; and, where the defendant has made a deed to the trustee in accordance with the terms of such decree, which is accepted by the plaintiff who enjoys the benefit of the trust until her death more than two years later, the executor of the plaintiff's will, if the circumstances under which the interlocutory decree was made do not appear, cannot be heard to assert that the decree or the trust created by it was invalid.

In such a case the duties of the trustee appointed by the interlocutory decree do not terminate upon the death of the original plaintiff in the suit, and it is his duty, before paying over the balance of the fund to the executor of the will of the deceased plaintiff, to pay the expenses incurred under the trust, comprising all disbursements and obligations for the comfortable support and maintenance of the deceased plaintiff, for his own charges and compensation, and for proper services rendered to him by counsel, including necessary services rendered in litigation incidental to the settlement of his accounts.

Where a trust is created by an interlocutory decree made by the Superior Court in a suit in equity and a trustee is appointed under the general equity jurisdiction of the court with duties analogous to those of a receiver, such trustee is not required to give a bond to the judge of probate under R. L. c. 150, § 1, and his accounts as trustee can be settled in the original suit.

BILL IN EQUITY, filed in the Superior Court on September 1 and amended on November 17, 1905, by a widow then eighty-four years of age against the husband of a niece of the plaintiff, seeking to set aside a deed from the plaintiff, conditioned upon the comfortable support of the plaintiff by the defendant during the plaintiff's life, and for a reconveyance of the property therein described, the bill containing also a prayer for further relief.

On October 29, 1906, an interlocutory decree was entered in the Superior Court, ordering the defendant to convey to Edwin M. Brooks, trustee, all the property conveyed to him by the plaintiff, together with the proceeds, income and accumulations of such property and all money and property received by the defendant by virtue of or under the deed from the plaintiff. The decree contained other orders and provisions including those that are described in the opinion. In accordance with the orders contained in the decree the defendant on November 7, 1906, made a deed, in which his wife joined, conveying to Edwin M. Brooks, "as he is trustee under a certain trust set forth in a decree entered in the Superior Court [in this case]," the property described and designated in the decree.

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The plaintiff died on June 24, 1909, leaving two wills which were offered for probate. Under the will allowed Helen R. Stevens and Emma F. Merrill, the wife of the defendant, were appointed executrices and qualified as such.

On April 10, 1912, by an order of the Superior Court the case was referred to Arthur P. Hardy, Esquire, as master, who on March 7, 1913, filed an amended report.

One of the objections to the master's report made by the executrices was as follows: "1. Because the report does not show whether or not Mrs. Rice the nominal complainant ever consented to the entry of the decree, or had any knowledge that the decree was to be entered, or that the conveyance of the legal estate in the property to Mr. Brooks, as trustee, had been made, though he was requested by the respondents to rule thereon." The master overruled this objection as follows: "I overrule the first of the remonstrants' objections for the reason that no evidence was introduced before me which would justify a finding that Mrs. Rice did or did not consent to the entry of the decree, or whether or not she had any knowledge that the decree was to be entered, or whether or not she had any knowledge that the conveyance of the legal estate in the property to Mr. Brooks, as trustee, had been made. Mr. Brooks testified that shortly prior to the entry of the decree he had several interviews with Mrs. Rice in Woburn, but that he had no record or recollection of the subject matter of such interviews."

The master overruled other objections on the ground that they were founded on requests for rulings on matters of law with which it was beyond the province of the master to deal. The master on the same ground overruled objections of Edwin M. Brooks, trustee, founded on requests for the following rulings:

"1. The decree creating the trust is a valid decree.

"2. The Superior Court had jurisdiction to enter the decree creating the trust.

"3. If a valid trust was not created by the decree of October 27, 1906, a valid trust was created in accordance with the terms of said decree by the deed from Frederic D. Merrill to the trustee.

"4. The trust is still an active trust.

"5. The trust was not terminated by or on the death of Emeline S. Rice.

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"6. A trust is not in law terminated until its expressed purposes are performed.

"7. The trustee still has legal title to the real estate.

"8. The trustee still has legal title to the personal estate.

"9. The trustee is entitled to fair and reasonable compensation for the management of the trust property.

"10. The trustee is entitled to fair and reasonable compensation for legal services performed by him in good faith and in the exercise of reasonable diligence for the trust or for the trustee.

"11. Messrs. Whipple, Sears and Ogden are entitled to fair and reasonable compensation for legal services rendered by them for the petitioner and for the trust and for the trustee.

"12. It is not law in this Commonwealth that a trustee is not entitled to fair and reasonable compensation for legal services performed by him for the benefit of his trust.

"13. A trustee who has made any expenditure in the administration of his trust in good faith and in the exercise of reasonable diligence and discretion should be allowed in his accounts for such expenditure.

"14. In case a trustee pays to a third party an amount which the trustee reasonably believes such third party has expended with the trustee's consent and approval for the benefit of the beneficiary under the trust, the trustee should be allowed for such payment in his accounts, even though such amount subsequently proves not to have been in fact expended by such third party for the benefit of the beneficiary, — provided the trustee has acted in good faith and in the exercise of reasonable diligence and discretion."

Exceptions to the master's report were filed which included exceptions based on the master's overruling of the objections stated above.

The case came on to be heard before *Morton*, J., who reserved it for determination by this court.

J. W. Grimes, (*S. Bancroft* with him,) for the executrices of the will of Emeline S. Rice.

E. M. Brooks, trustee, *pro se*.

SHELDON, J. The decree entered by the Superior Court on October 29, 1906, ordering the defendant to convey to Mr. Brooks as trustee the real and personal property therein mentioned,

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to be held by him for the benefit of Mrs. Rice upon the trusts therein stated, was not invalid or beyond the power of that court to make. We do not know what evidence was heard or what findings were made, and every presumption is to be made in favor of the action of the court. It must have been found that the defendant had not the right to retain the property. It may be that Mrs. Rice requested the court to order the property to be conveyed to Mr. Brooks upon the stated trusts, and that the defendant consented to this. If so, it must have been found that Mrs. Rice had full capacity to express this desire and to have it acted upon. Neither party appears to have objected to the decree. Neither one appealed from it; it was carried out by a conveyance to Mr. Brooks; he entered upon the discharge of the trust and acted under it without objection for nearly three years and until after the death of Mrs. Rice. The relief given was within the scope of the prayer for further relief. After this acquiescence by all parties, after Mrs. Rice has, as we must presume, requested and procured the entry of the decree in this form while she was fully competent to do so, and after she has taken the benefit of the conveyance to the trustee and of his management of the property, no one claiming under her can now be heard to assert that either the decree or the trust thereby created was invalid.

If this were not so, yet the deed of the defendant to Mr. Brooks created a valid trust. The deed was made, as we must infer, in settlement of the suit, at the request of Mrs. Rice, when all the parties were *sui juris*. The reference to the decree, even if the decree were invalid, yet fixed exactly the terms of the trust and the duties of the trustee. On either alternative the trust was a good one. But we prefer to rest upon the ground that the decree was valid and cannot now be avoided.

It remains to be determined whether the trustee's accounts can be settled in the original suit.

The trust was created by the decree; and the decree reserves the right to the trustee and to the beneficiary to apply to the court at any time for the modification of the decree and of the trust itself. It did not purport to be a final decree. The beneficiary was Mrs. Rice in her lifetime, and after her death her personal representative. Plainly it was the intention of the court to keep the management of the trust in its own hands and under its own control. If

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Mr. Brooks had been called a receiver instead of a trustee, the difficulty would have been obviated, although the legal title and the same powers of control had been given to him. But the mere name of receiver or trustee is not of controlling importance. The Superior Court has general equity powers; R. L. c. 159, § 1; and the subject of the control of trusts and trustees is one of the recognized departments of equity jurisdiction. R. L. c. 162, § 5, and c. 147, § 5. *Attorney General* v. *Barbour*, 121 Mass. 568, 573. *Hayes* v. *Hall*, 188 Mass. 510. Mr. Brooks was not required to give a bond to the judge of probate, and does not come within the requirements of R. L. c. 150, § 1. We are of opinion that the Superior Court had power to pass upon and settle his accounts in the original suit.

By the terms of the trust it was his duty upon the death of Mrs. Rice to apply any balance of the trust funds in his hands, "in satisfaction of any just debts or expenses incurred under the trust," including his own proper charges; and it was only the net balance then remaining that he was to convey and transfer to her executor or administrator. These expenses must include all disbursements and charges for the comfortable support and maintenance of Mrs. Rice, for his own charges and compensation, and for proper services rendered to him by his counsel, including whatever necessary services have been rendered in litigation incidental to the settlement of his accounts. They should not include compensation for services rendered to Mrs. Rice by her counsel before the creation of the trust, except so far as these have been paid by the trustee in her lifetime for her personal benefit and relief. The papers furnished to us do not state the amounts and details of the items of the trustee's accounts and therefore we do not go into figures. But upon the master's findings the specific items mentioned in his report should be allowed for the amounts stated by him. Nor did all the duties of the trustee end upon the death of Mrs. Rice.

A decree should be entered overruling all the exceptions of both parties to the master's amended report, and ordering the trustee to pay over any net balance remaining in his hands, after the allowances which have been mentioned, to the executrices of the will of Mrs. Rice.

So ordered.

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CATHERINE L. HANLEY & another *vs.* ÆTNA INSURANCE COMPANY.

Suffolk. November 11, 1912. — September 11, 1913.

Present: RUGG, C. J., HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Insurance, Fire. *Reference and Referee. Contract*, Construction. *Words*, "Reference."

In an action on a policy of insurance against fire in the Massachusetts standard form, where the defendant relied on the defense that the award of the referees as to the amount of loss was invalid, because the referees had refused to hear the evidence offered by the defendant, it did not appear what the evidence was that the defendant offered to introduce before the referees, and *it was said* by this court, that, had they not preferred to base their decision on a broader ground, they might have disposed of the case on the ground that the burden was on the defendant to show that the evidence excluded was material and that the defendant had been harmed by the exclusion, and that such burden had not been sustained.

Discussion by LORING, J., of the cases in other jurisdictions upon the question whether referees to determine the amount of a loss by fire under a clause in a policy of insurance similar to that contained in the Massachusetts standard form of policy should sit as a *quasi* court and make their determination on evidence presented by the respective parties or whether they should ascertain the facts in any fair way satisfactory to themselves.

Discussion by LORING, J., of the history and purpose of the statutes, which resulted in St. 1887, c. 214, § 60, now St. 1907, c. 576, § 60, establishing the present Massachusetts standard form of fire insurance policy, especially in relation to the clause providing for the determination of the amount of the loss by referees.

Referees appointed to determine the amount of a loss by fire under the Massachusetts standard form of fire insurance policy, set forth in St. 1907, c. 576, § 60, may determine the amount of such loss in any way that in the exercise of an honest discretion they may think wise, and their award will not be made invalid by a refusal in good faith to hear evidence offered by the insurance company as to the amount of the loss.

In deciding that the referees, appointed to determine the amount of a loss by fire under the Massachusetts standard form of fire insurance policy, may determine the amount of such loss in any way that in the exercise of an honest discretion they think wise, it was *said*, that, where a building insured is wholly destroyed, it ordinarily would be a wise exercise of discretion for the referees to determine the amount of the loss after a hearing conducted in the usual way in which civil cases are tried.

In an action on a policy of fire insurance in the Massachusetts standard form, where the defense relied upon was that the award of the referees determining the amount of loss was invalid, and where the trial took place more than two

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years after the fire so that, if the present action could not be maintained, no new action could be brought within the limit of time fixed by the policy, *it was said*, in deciding that the award was valid, that, if the award had been invalid, it would not follow necessarily that judgment should be entered for the defendant. The court expressed no opinion on the question, whether the provision in the standard form of policy that "such reference unless waived by the parties shall be a condition precedent to any right of action" makes the condition precedent the reference only or whether an award completing the reference is also a part of the condition.

LORING, J. This is an action on a policy of fire insurance in the form prescribed by St. 1907, c. 576, § 60, brought to recover the amount found by referees appointed in accordance with the terms of the policy to have been the amount of injury done to the plaintiffs' building by a fire against which the plaintiffs were insured. The building in question was injured but not destroyed. At the trial the defendant insurance company proved by the testimony of the third referee that the referees had refused to admit evidence offered by it bearing on the amount of the loss. The third referee testified that the award was made on what he saw, aided by thirty years' experience in the lumber business and by his experience in having buildings erected for him, and that he did not think that the evidence offered was worthy of consideration. It was agreed by counsel that this evidence was to be taken to be true. It is a fair inference from the report that it covered the action of the other referee who signed the award. On re-cross examination by the defendant's attorney the third referee, in answer to the question, "And you considered it to be your duty, in making that examination, to rely solely upon what you could see yourself," testified that he did. We do not construe this to modify his preceding testimony that the evidence offered was excluded because the referees in their discretion decided not to admit it. It is expressly stated in the report that the defendant did not question the good faith of the two referees who signed the award.

Upon this testimony the presiding judge * ruled that as matter of law the award was invalid because the referees refused to hear the evidence offered by the defendant, and directed a verdict for the defendant. The case is here on report.

It did not appear at the trial in the Superior Court what the

* *Fox*, J.

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evidence was which the defendant offered to introduce before the referees. If the defendant had a right to put in any pertinent evidence before the referees, the burden was on the defendant to show that the evidence excluded in the case at bar was material and that the defendant was harmed by the exclusion. That burden was not sustained here by the defendant, and this case might be disposed of on that ground. But the conduct of hearings by referees appointed under the Massachusetts standard form of fire insurance policy is a practical matter of almost daily occurrence which should not be left in uncertainty. For that reason we prefer to decide the case on the broader ground that it is within the discretion of the referees, in cases like the case at bar, to admit evidence or to find the amount of the loss by inspection, or by inspection and information obtained by them in such way as they in their discretion think fit.

It was decided in *Christianson* v. *Norwich Union Fire Ins. Society*, 84 Minn. 526, that referees appointed under a standard form of policy like our own (see Gen. Laws of Minn. 1895, c. 175, § 53) should sit as a *quasi* court and decide the case on evidence offered by the respective parties. There had been a previous decision to the same effect (*Mosness* v. *German-American Ins. Co.* 50 Minn. 341), when there was no standard form of policy in that State (see Gen. Laws of Minn. 1889, c. 217), and where the policy in question contained the provision which is found in the New York standard form. For subsequent cases confirming the decision in *Christianson* v. *Norwich Union Fire Ins. Society, ubi supra*, see *Redner* v. *New York Fire Ins. Co.* 92 Minn. 306; *Schoenich* v. *American Ins. Co.* 109 Minn. 388. There is a similar decision in South Dakota (*Mason* v. *Fire Association of Philadelphia*, 23 So. Dak. 431), under a standard form of policy like that prescribed in New York. See Laws of South Dakota, 1893, c. 105. And in *Canfield* v. *Watertown Fire Ins. Co.* 55 Wis. 419, a similar decision was made in case of a policy which was not prescribed by statute but which contained the provision found in the New York standard form of fire insurance policy stated later on.

The opposite conclusion however has been reached in every other State in which the question has arisen. See *Bangor Savings Bank* v. *Niagara Fire Ins. Co.* 85 Maine, 68; *Hall* v. *Norwalk Fire Ins. Co.* 57 Conn. 105; *Townsend* v. *Greenwich Ins. Co.* 86 App.

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Div. (N. Y.) 323, affirmed in 178 N. Y. 634; *Royal Ins. Co.* v. *Ries*, 80 Ohio St. 272; *Vincent* v. *German Ins. Co.* 120 Iowa, 272; *Liverpool & London & Globe Ins. Co.* v. *Goehring*, 99 Penn. St. 13; *Stout* v. *Phœnix Assur. Co.* 20 Dick. 566; *American Central Ins. Co.* v. *Landau*, 17 Dick. 73, 93; *Carlston* v. *St. Paul Fire & Marine Ins. Co.* 37 Mont. 118; *American Steel Co.* v. *German-American Fire Ins. Co.* 187 Fed. Rep. 730. See also *Continental Ins. Co.* v. *Vallandigham*, 116 Ky. 287, 300. These cases have arisen under the New York standard form of policy or under a policy not prescribed by statute which contained a clause like that in the New York standard form. The New York standard form provides that: "In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and failing to agree shall submit their differences to the umpire, and the award in writing of any two shall determine the amount of such loss." For the New York standard form see 1 Clement, Fire Ins. (1905 ed.) 474, and *Fleming* v. *Phœnix Assur. Co.* 75 Hun, 530. It is not of consequence whether the persons who are to fix the amount of the loss as between the insured and the insurer are called appraisers or referees, nor whether their decision is called an award or an appraisal. We do not overlook the fact that in the New York standard form it is called an award. If the rights of the parties are fixed by persons called appraisers and their conclusion is called an appraisal, they are in effect referees and their conclusion is in effect an award.

The history and purpose of the statutes which resulted in St. 1907, c. 576, § 60, establishing the Massachusetts standard form of fire insurance policy containing the clause here in question, show that the referees appointed under it were intended to be referees of the character previously described in *Palmer* v. *Clark*, 106 Mass. 373, theretofore well known in the jurisprudence of this Commonwealth. See *Flint* v. *Gibson*, 106 Mass. 391; *Robbins* v. *Clark*, 129 Mass. 145; *Haley* v. *Bellamy*, 137 Mass. 357. In *Palmer* v. *Clark*, Colt, J., at p. 389, said: "A reference to a third person to fix by his judgment the price, quantity or quality of

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material, to make an appraisement of property and the like, especially when such reference is one of the stipulations of a contract founded on other and good considerations, differs in many respects from an ordinary submission to arbitration. It is not revocable. The decision may be made without notice to or hearing of the parties, unless such notice and hearing be required by express provision or reasonable implication; and it may be made upon such principles as the person agreed on may see fit honestly to adopt, or upon such evidence as he may choose to receive."

Before any statute on the subject had been enacted, a contest under a policy of fire insurance almost always was begun by putting the insured to a proof of the amount of his loss. That generally meant a reference to an auditor whose conclusion, often reached after many hearings extending over a long period of time, was subject to revision at the trial of the cause in court. Such a method of determining the amount of loss under a fire insurance policy was an unsatisfactory one, and it was manifestly the purpose of the statutes which ended in St. 1887, c. 214, § 60 (now St. 1907, c. 576), to do away with it and provide a better one. The form of policy first prescribed by statute in Massachusetts (St. 1873, c. 331) provided that: In "case any difference of opinion shall arise as to the rights of the parties under this policy, the subject thereof shall be referred to three disinterested men . . . and the decision of a majority of said referees shall be final and binding on the parties." The second standard form prescribed by St. 1881, c. 166 (re-enacted in Pub. Sts. c. 119, § 139), contained the same provision "as to the amount of loss under this policy." It was held in *Reed* v. *Washington Fire & Marine Ins. Co.* 138 Mass. 572, that under this last provision the insured could maintain an action on the policy without procuring an award by referees as therein provided. The ground of this decision was that the provision as to having the amount of loss decided by referees was an agreement to refer a cause of action, not a provision "that a cause of action shall arise upon the appraisal or award, which is preliminary to, and in aid and a condition of, the right of action," to quote the words of W. Allen, J., in that case. See pp. 575, 576. Soon after that decision a change was made by St. 1887, c. 214, § 60, and the present provision (now found in St. 1907, c. 576, § 60) was inserted in the standard form of fire

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insurance policy. The present provision is: "In case of loss under this policy and a failure of the parties to agree as to the amount of loss, it is mutually agreed that the amount of such loss shall be referred to three disinterested men, the company and the insured each choosing one out of three persons to be named by the other, and the third being selected by the two so chosen; the award in writing by a majority of the referees shall be conclusive and final upon the parties as to the amount of loss or damage, and such reference unless waived by the parties shall be a condition precedent to any right of action in law or equity to recover for such loss; but no person shall be chosen or act as a referee, against the objection of either party, who has acted in a like capacity within four months." It was held in *Lamson Consolidated Store Service Co.* v. *Prudential Fire Ins. Co.* 171 Mass. 433, that unless waived by the parties this clause created a condition precedent.

The manifest purpose of these enactments was to provide for a new method of determining the amount of loss in place of having that question decided in the way in which cases are tried in court. We cannot believe that it was intended that the referees who were substituted for the court (including an auditor, if appointed, or a jury, if claimed, or both) should be bound to try this question of fact as such questions are tried in civil actions in court. On the contrary we are of opinion that the purpose of these enactments (which ended in St. 1887, c. 214, § 60, now St. 1907, c. 576, § 60) was to adopt the summary method of establishing the amount of the loss which theretofore had been explained in *Palmer* v. *Clark* and had become familiar knowledge from the subsequent cases of *Flint* v. *Gibson*, *Robbins* v. *Clark*, and *Haley* v. *Bellamy*, *ubi supra*. It would be hard to reconcile the decision made in *Farrell* v. *German-American Ins. Co.* 175 Mass. 340, with any other view.

We are therefore of opinion that referees appointed under the Massachusetts standard policy are not bound to receive evidence upon the amount of the loss, but may proceed to determine that fact in any way in which in the exercise of an honest discretion they may think wise. It follows that the award in the case at bar was not invalid because the referees in their discretion refused to hear the evidence offered by the defendant.

We think it proper to add that when the building insured is wholly destroyed it would be a wise exercise of discretion — ordi-

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narily, at any rate — to determine the amount of loss in the usual way in which civil cases are tried. See in this connection Lurton, J., in *Continental Ins. Co.* v. *Garrett*, 125 Fed. Rep. 589, 592, and *Carlston* v. *St. Paul Fire Ins. Co.* 37 Mont. 118.

There is one other matter which we think should not be passed by, if for no other reason because by our silence we might be taken to have approved the action taken by agreement in the Superior Court. By the terms of the report if the award was invalid judgment was to be entered for the defendant. The fire here in question happened on September 11 and 12, 1909. The trial took place December 11, 1911. By force of the clause in the policy providing that no suit or action for any claim by virtue of the policy shall be sustained unless begun within two years from the time the loss occurred, no action other than the one now before us ever can be brought on this policy. If the course sanctioned by the Superior Court is right, an insurance company can lie by until it is too late for a new action to be brought and then for the first time assert that an award is invalid, and if invalid, that it is entitled to judgment. It has been held in other jurisdictions that in case an award turns out to be invalid without fault on the part of the insured, a new appraisement should be made, or if that is refused, an action can be brought on the policy, in which the damages can be proved without resort to referees. See for example *Caledonia Ins. Co.* v. *Traub*, 83 Md. 524; *Christianson* v. *Norwich Union Fire Ins. Society*, 84 Minn. 526; *Levine* v. *Lancashire Ins. Co.* 66 Minn. 138. But see in this connection *Weisman* v. *Firemen's Ins. Co.* 208 Mass. 577. It is to be observed that it is a "reference" to referees, not an award by referees which by the literal terms of the Massachusetts standard policy is made a condition precedent. We express no opinion upon the question whether the condition precedent created by this clause is limited to a reference only, or covers all acts which a reference requires including an award. In this respect the Massachusetts standard form differs from the New York form which provides that the loss shall not become payable until sixty days after (*inter alia*) an award by appraisers when an appraisal has been required. See 1 Clement, Fire Ins. (1905 ed.) 479.

By the terms of the report the entry must be judgment for the plaintiffs for $429.70, with interest less $25, being one half the

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sum paid by the defendant to the third referee for his services. That is to say, the plaintiffs are entitled to interest on $429.70 from the expiration of sixty days after the plaintiffs submitted a statement in writing of their loss.

So ordered.

D. H. Fulton, for the plaintiffs.
W. L. Came, for the defendant.

HAROLD GODFREY *vs.* BOSTON ELEVATED RAILWAY COMPANY.
JAMES GODFREY *vs.* SAME.

Suffolk. January 8, 1913. — September 11, 1913.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Negligence, In use of highway, Street railway. *Constitutional Law. Practice, Civil*, Report.

A boy six years and eight months of age, who is playing tag with two other boys on a city street with parallel street railway tracks, on which he knows that cars are passing frequently at all times of day, and, being absorbed wholly in his play, runs in front of an approaching street railway car which is so near that it strikes him with hardly an appreciable interval of time as soon as he reaches the track, is not in the exercise of any care at all, and consequently cannot recover for his injuries thus caused, assuming that the motorman was negligent.

St. 1912, c. 317, providing that "if the justice who presides at a trial has reserved a case for report to the Supreme Judicial Court, or to the full court, and fails, by reason of physical or mental disability, death or resignation, to make such report, any other justice of the same court may examine and report the same," is constitutional.

MORTON, J. These are two actions of tort. The first is to recover damages to the plaintiff, a minor six years and eight months old at the time of the accident, for injuries caused by being run over by a car operated by the defendant company. The second is by the father for loss of services, medical attendance and nursing. The accident happened on June 28, 1903, at about half past seven o'clock in the evening on Dorchester Avenue in Boston. The two actions were tried and have been argued together. At the close of the evidence the presiding judge directed a verdict for the

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defendant, and the case is here on report under St. 1912, c. 317, by another judge after the death of the presiding judge.*

We shall speak of the plaintiff in the first action as the plaintiff. The uncontradicted evidence showed that the plaintiff was playing tag with two boys, Joseph and John Murphy, children of a neighbor, in their back yard which adjoined his own; that the plaintiff was chasing the Murphy boys and that John ran out of the yard and into and across the avenue, over to the sidewalk on the other side of the avenue, the plaintiff running after him; that according to the plaintiff's testimony John, after dodging between two men or around an electric pole, turned and ran back again, the plaintiff still running after him, and that he (the plaintiff) heard some one shout "Get out of the way," and looked up and saw the motorman and then was struck by the car. The plaintiff testified that he did not see any car and heard no gong or anything to indicate that a car was coming. On cross-examination he testified amongst other things as follows: "Q. You were running about as fast as you could when you were going back, the same as you were when you were coming over? A. Yes, sir.—Q. And you were not paying any attention to anything but John when you were going back, were you? A. No, sir.—Q. And you didn't hear anything? A. No, sir.—Q. But you did not listen, did you? A. Yes, sir.—Q. Listen? A. Yes, sir.—Q. But you didn't hear anything? A. No, sir.—Q. And you didn't see anything? A. No." The plaintiff also testified that as he started to go back he heard Joseph, who remained on the other side of the avenue, shout "Hurry up." The testimony of Joseph, who was called as a witness by the plaintiff, differed slightly from that of the plaintiff. He testified that after the plaintiff and John got over on to the sidewalk on the opposite side of the avenue the plaintiff tagged John, and that John fell down and the plaintiff started and ran back as fast as he could towards the witness, looking directly at him, and was struck by the car coming down the avenue; and that as the plaintiff started back he (the witness) shouted to him "Hurry up across or else he would be it."

Dorchester Avenue is straight for a long distance from where the accident took place, with a slight downward grade in the direc-

* The presiding judge was *Bishop*, J. The report was made by *McLaughlin*, J.

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tion in which the car was coming. The plaintiff was "a quick, bright, intelligent and active" child, and was well acquainted with the avenue, having gone along it for a year on his way to school, and knew that there were double tracks "with cars going frequently at all times of the day." It was not contended that he was not of sufficient age, intelligence and experience to be upon the street unattended. The contrary is insisted upon by the defendant and is asserted by the plaintiff. No question of due care on the part of the plaintiff's parents is therefore involved. See *Slattery* v. *Lawrence Ice Co.* 190 Mass. 79. He was lawfully upon the street, but it is apparent, as he himself said in substance, that he was not paying attention to anything except the game that he was playing. He did not look to see whether a car was coming, and though he says that he listened it is manifest that his attention was absorbed by his play. He ran into the street when the car was so near that it struck him with hardly an appreciable interval of time as soon as he reached the track, and he says that he did not see it or hear it. Nothing but utter inattention prevented him from doing so. A certain amount of heedlessness is to be expected in a child of his age and is consistent with due care on its part. But the trouble with the plaintiff's case is that the only reasonable construction that can be given to his and the other testimony is that he was not exercising any care whatever. The shout of Joseph to "Hurry up" was an incident of the play and did not excuse the failure of the plaintiff to exercise due care. The case is a hard one for the plaintiff. He lost both hands. But unless we are prepared to hold that in every case where a child of tender years is injured by the negligence of another he is entitled to recover, we must sustain the ruling. In the case of *Aiken* v. *Holyoke Street Railway*, 180 Mass. 8, which amongst those cited by the plaintiff most resembles this, there was evidence tending to show that the plaintiff had ceased his play and was using the highway as a traveller returning home. See *Messenger* v. *Dennie*, 137 Mass. 197; *Hayes* v. *Norcross*, 162 Mass. 546; *Morey* v. *Gloucester Street Railway*, 171 Mass. 164; *Gleason* v. *Smith*, 180 Mass. 6; *Young* v. *Small*, 188 Mass. 4; *Murphy* v. *Boston Elevated Railway*, 188 Mass. 8; *Stackpole* v. *Boston Elevated Railway*, 193 Mass. 562; *Holian* v. *Boston Elevated Railway*, 194 Mass. 74; *Russo* v. *Charles S. Brown Co.* 198 Mass. 473; *Kyle* v. *Boston*

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Elevated Railway, ante, 260; *Walukewich* v. *Boston & Northern Street Railway, ante,* 262. We have assumed in the plaintiff's favor that there was evidence of negligence on the part of the motorman. It is plain also, if that question were material, that there was evidence of due care on the part of the plaintiff's mother, under whose charge he was.

The question of the constitutionality of St. 1912, c. 317 * pursuant to which the case was reported, has not been argued by the defendant though raised by it in the Superior Court. It plainly is constitutional. It relates to a matter of procedure or remedy, and does not affect vested rights. *Robbins* v. *Holman,* 11 Cush. 26. *George* v. *Reed,* 101 Mass. 378.

In accordance with the report the entry will be judgment on the verdict.

So ordered.

S. L. Whipple & H. H. Bond, for the plaintiffs.

R. A. Stewart, (E. S. Kochersperger, with him,) for the defendant.

MICHAEL CORBETT *vs.* NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY.

Suffolk. January 9, 1913. — September 11, 1913.

Present: RUGG, C. J., MORTON, HAMMOND, BRALEY, & SHELDON, JJ.

Negligence, In delivering freight, Railroad. *Carrier,* Of goods.

In an action against a railroad corporation by a teamster for personal injuries sustained from a door of a sealed car in a freight yard of the defendant falling upon the plaintiff when he was attempting to open the door for the purpose of unloading the car, if it appears that the defendant had placed the car on its delivery track and, through a clerk, had pointed out the car to the plaintiff, this can be found to have constituted a representation by the defendant to the plaintiff that the car was in a suitable place and condition for him to unload it, and a permission, if not an invitation, to him to unload it.

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* That statute provides as follows: "If the justice who presides at a trial has reserved a case for report to the Supreme Judicial Court, or to the full court, and fails, by reason of physical or mental disability, death or resignation, to make such report, any other justice of the same court may examine and report the same."

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In the above described action an instruction, to the effect that the defendant was not liable unless the car had been in the freight yard long enough for the defendant to inspect it, was said to have been unnecessarily favorable to the defendant, because the defendant's liability did not depend on whether it had had a reasonable opportunity to inspect the car but on its failure to use reasonable care to see that the car was in a condition to be unloaded safely by the plaintiff.

TORT by a teamster, who had been sent by his employers to unload wool from a sealed car in a freight yard of the defendant, for injuries sustained on August 22, 1910, when the plaintiff was attempting to open a door of the car as stated in the opinion. Writ dated November 7, 1910.

In the Superior Court the case was tried before *Dubuque*, J. The evidence is described in the opinion.

At the close of the evidence the defendant asked the judge to make the following rulings:

"1. Upon the whole evidence the plaintiff is not entitled to recover.

"2. The evidence is not sufficient to warrant a recovery upon the plaintiff's declaration.

"3. The evidence does not sustain the case set forth in the declaration.

"4. If the jury find that the plaintiff attempted to pry open the car door with an iron bar, the plaintiff is not entitled to recover.

"5. If the jury find that the plaintiff tried the car door and finding that he could not push it open with his hands, attempted to pry it open with an iron bar, and in so doing caused it to fall, the plaintiff is not entitled to recover.

"6. If the plaintiff tried the car door and found that it would not open in the usual way, and that it was necessary to use an iron bar to move it, he should have reported the matter to the defendant and given the defendant an opportunity to remedy the difficulty, rather than attempt to force the door open himself.

"7. Upon the evidence the plaintiff had no right to work on the side of the car he was on when the door fell.

"8. If the plaintiff chose to go to the side of the car upon which he was when the door fell, he did so at his own risk; in doing this he was not acting upon any invitation of the defendant.

"9. The doctrine of *res ipsa loquitur* does not apply to this case."

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The judge refused to make any of these rulings, and gave to the jury other instructions, some of which are stated in the opinion.

The defendant, besides excepting to the refusal of the rulings, also excepted to certain portions of the charge as follows:

"To that portion of the charge in which the court instructed the jury that it was for them to say whether it was reasonable for the plaintiff to try to open the door in the way he did for the purpose of ventilation;

"To that portion of the charge wherein the court also instructed the jury that if the plaintiff used a bar and so caused the door to fall upon him it was for the jury to say whether the plaintiff was negligent in so using the bar;

"To that portion of the charge in which the court instructed the jury that it was a question of fact for them to determine whether the car had been at this place long enough to make it the defendant's duty to have inspected it;

"To that portion of the charge in which the court instructed the jury that it was a question of fact for them to determine whether the plaintiff acted reasonably in using a crowbar under the circumstances, if he did use one."

The jury returned a verdict for the plaintiff in the sum of $250; and the defendant alleged exceptions.

The case was submitted on briefs.

G. L. Mayberry, for the defendant.

J. J. Mansfield, for the plaintiff.

MORTON, J. This is an action of tort to recover for injuries caused by the falling of a car door upon the plaintiff as he was attempting to open it. The case is here on the defendant's exceptions.

The car was a Chicago and Great Western Railroad Company car, and was loaded with wool which the plaintiff was sent by his employers, a firm of teamsters, to unload and deliver "where it was going." It was in the defendant's yard at East Boston known as the Porter Street yard, and stood upon a delivery track so called. There was evidence tending to show that a clerk in the defendant's employ acting, as could be found, within the scope of his authority, and for the purpose of aiding the plaintiff in the unloading of the car, pointed out its location to the plaintiff. On one side of the car there was a space for teams and the delivery

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of freight, but none on the other. The car had two doors on opposite sides, both sealed. There was nothing to show that any directions were given or were expected to be given to the plaintiff by the defendant in regard to unloading the car, and, so far as appears, he was left to break the seals and open and unload the car in his own way. The plaintiff drew up alongside the car with his team and tried to open the door, as he testified, but was unable to do so on account of the wool that pressed against it. Thereupon he went round to the other door, broke the seal, lifted the latch or hasp, and was in the act of shoving back the door when it fell upon him. This was in substance the plaintiff's account of the accident. The defendant introduced evidence tending to show that the door on the delivery side was open, and that the plaintiff attempted to open the other door for more ventilation; that the door was in good condition; and that in opening it the plaintiff used an iron bar and pried it up out of the groove in which it ran, and thereby caused it to fall on him. This was denied by the plaintiff.

The question whether the accident happened as the plaintiff testified that it did, or in the manner described by the defendant, or in some other manner, was plainly one of fact for the jury. It could not be ruled as matter of law that the plaintiff had no right to open the door for ventilation or for the purpose for which he testified that he opened it. The placing of the car upon a delivery track and the pointing out of its location by the clerk to the plaintiff constituted, or could be found to constitute, a representation by the defendant on which the plaintiff was justified in acting, that the car was in a suitable place and condition for him to unload, and an assent to his unloading it if not an invitation to him to unload it. And he was left, so far as appears, as already observed, to break the seals and open and unload it in his own way. It was for the jury to say whether, when he found, according to his own testimony, that he could not open the door on the delivery side, he was required in the exercise of due care to notify the defendant, or seek assistance from it. It was also for the jury to say whether, if they found that the plaintiff opened the door with an iron bar, that was under the circumstances a proper way to open it, and whether the plaintiff used due care. There was evidence tending to show that it was sometimes necessary to use an

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iron bar in opening a car. The judge instructed the jury in substance that if the door was not defective and it fell because of the plaintiff's carelessness in using an iron bar and in prying the door out of the groove or slide in which or on which it ran, then the plaintiff could not recover. The defendant in effect concedes that the fall of the door, if it occurred in the way in which the plaintiff testified that it did, would be evidence of negligence on the part of some one, but it contends that the only duty which, under the circumstances, it owed to the plaintiff was that of proper inspection, and that the falling of the door in the manner described by the plaintiff was not of itself evidence of negligence by it in the performance of that duty, for the reason that it did not appear how long the car had been in the defendant's possession. But the plaintiff was not an employee of the defendant, and the defendant owed him no duty of inspection as such. The relation which the plaintiff occupied towards the defendant was that of one coming to its premises on business which involved the unloading of the car by him and in respect to whom the defendant was required to exercise reasonable care to see that the car was in a condition to be safely unloaded. It was for the jury to say whether the defendant had exercised such care and whether the accident was due to its negligence. It could not be ruled as matter of law that it was not, and by leaving it to the jury to say whether the car had been there long enough to allow the defendant to inspect it, the court ruled too favorably, if anything, for the defendant. Its liability did not depend on whether it had or had not had a reasonable opportunity to inspect the car, but on its failure to use reasonable care to see that the car was in a condition to be safely unloaded by the plaintiff.

We discover nothing in the conduct of the trial which requires that the exceptions should be sustained.

Exceptions overruled.

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JAMES A. WHITCOMB *vs.* NEW YORK, NEW HAVEN, AND HARTFORD RAILROAD COMPANY.

SAME *vs.* SAME.

Suffolk. January 17, 1913. — September 11, 1913.

Present: RUGG, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Railroad. Carrier, Of passengers. *Damages,* In tort. *Husband and Wife. Practice, Civil,* Findings of trial judge.

Money, not intended for travelling expenses, in a handbag carried by a passenger in a railroad train is not baggage for the loss of which the corporation operating the railroad is liable.

In an action of tort for personal injuries, which is tried before a judge without a jury and in which the defendant's liability is admitted, where no ruling of law is asked for or made in regard to the amount of damages to be allowed for medical attendance, the amount of such damages is a matter of fact to be determined by the decision of the trial judge. In the present case *it was said,* that, if the findings of the judge upon this matter were reviewable, this court saw no error in them.

Where a married woman has recovered judgment against a railroad corporation in an action for personal injuries caused by a collision of trains, her husband, in a subsequent action against the railroad corporation for consequential damages caused to him by her injuries, can recover nothing for loss of consortium. Following *Bolger* v. *Boston Elevated Railway,* 205 Mass. 420.

In an action of tort by a husband against a railroad corporation for consequential damages caused by personal injuries sustained by the plaintiff's wife in a collision of trains on the defendant's railroad, for which the plaintiff's wife in a previous action has recovered damages from the defendant, where the case is tried before a judge without a jury and the evidence is conflicting as to whether certain medical attendance furnished for the plaintiff's wife was made necessary by the consequences of her injuries in the railroad accident or whether, if it was necessary at all, it was required for the treatment of an ailment from which the plaintiff's wife suffered before the accident and which was not due to the accident directly or indirectly, it is for the trial judge to say in the first place what injuries resulted from the accident and what, if any, diseases were set in motion by it as the direct and efficient cause, and then to say what medical and other attendance and treatment were reasonably necessary, and what was the fair value of the services and treatment so rendered.

MORTON, J. These two actions were tried and have been argued together. They are brought to recover for injuries caused by and damages arising out of a collision of trains on the defendant's

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road at Sharon Heights, on August 24, 1898. Both the plaintiff and his wife, Virginia H. Whitcomb, were injured, and it is claimed by the plaintiff that a sum of money belonging to him was lost at the time of the collision from a handbag carried by his wife.

The first action is for the plaintiff's personal injuries and for the money in the handbag belonging to him. The second action is for loss of the services and consortium of his wife during an illness subsequent to the accident, and for the expenses incident to such illness.

An action for the injuries sustained by the wife was brought by her and a verdict of $5,000 was rendered in her favor on which judgment was entered and an execution issued which was satisfied.

The cases were tried before a judge * without a jury. At the trial the defendant did not contest the question of its negligence nor the question of due care on the part of the plaintiff and his wife. The judge found in favor of the plaintiff in both actions, but refused to make certain findings or rulings requested by the plaintiff, and the cases are here on exceptions by the plaintiff to such refusal and to certain findings and rulings made by the presiding judge.

In the first action the judge found for the plaintiff and assessed the "damages in the sum of $750 including therein $100 for medical attendance." He ruled as "matter of law that the plaintiff cannot recover for money in the bag as it appears and I find that it was not carried for necessary travelling expenses." There is nothing to show that the money in the bag which the plaintiff alleged to belong to him was for travelling expenses, and it is plain that the ruling and finding in regard to such money were right. *Levins* v. *New York, New Haven, & Hartford Railroad,* 183 Mass. 175. *Dunlap* v. *International Steamboat Co.* 98 Mass. 371. *Jordan* v. *Fall River Railroad,* 5 Cush. 69.

The amount which the plaintiff was entitled to recover for personal injuries and which should be allowed for medical attendance on him was especially a matter for the trial judge to pass upon. He saw and heard the plaintiff and his witnesses as well as the witnesses for the defendant, and had opportunities which we have not of judging how much weight should be given to their testi-

* *Morton,* J.

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mony and whether the assertions of the plaintiff in regard to the injuries alleged to have been sustained by him were fair and reasonable or were exaggerated with a view to inflating the damages. There was testimony brought out on the cross-examination of the plaintiff's physician tending to show that the injuries sustained by the plaintiff were not so serious as he asserted that they were. And the same witness testified further on cross-examination that out of a bill for $6,500 rendered by him for medical attendance on the plaintiff and his wife he "should say $200 was for treatment upon Mr. Whitcomb." There was evidence which, we think, fairly warranted the trial judge in finding that even that amount was in excess of what could have been properly charged for attendance on the husband. The whole matter was one entirely within the discretion of the trial judge, and, if reviewable here, we see no error in the exercise of his discretion. No ruling of law was asked for or made.

In regard to the other action the judge found that "the plaintiff's wife received full compensation from the defendant for any injuries suffered by her by reason of the accident," and he ruled as matter of law that the plaintiff was not entitled to recover for loss of consortium. The evidence warranted the finding and the ruling was clearly right. *Bolger* v. *Boston Elevated Railway*, 205 Mass. 420. *Feneff* v. *New York Central & Hudson River Railroad*, 203 Mass. 278.

The plaintiff asserted and introduced evidence tending to show that after the accident his wife had an ovarian tumor of which the accident was the exciting cause, and that as a result of that and of other injuries sustained by the accident she suffered from neurasthenia and was ill for a long time and that he was put to great expense for medical attendance and nursing for her. The plaintiff asked the court to make the following findings or rulings: "3. That upon all the evidence as a matter of law the defendant is liable in damages as a case of directly ensuing loss for those damages to the plaintiff caused by the ovarian tumor which developed after the injuries to the plaintiff's wife, Virginia H. Whitcomb, and the resulting surgical operation and the after condition 4. That the defendant is liable not only for all damages from traumatic injuries resulting from the accident, but also for all other diseases and disabilities which were set in motion

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by the accident as a direct, immediate and efficient cause, so far as relates to the plaintiff's right of recovery." The judge found: "2. . . . That the ovarian cyst from which she [the plaintiff's wife] suffered was not due directly or indirectly to the accident; 3. . . . that she suffered from neurasthenia after the accident; that this nervous disease was caused in part by the accident and in part by the ovarian condition; and that she required more or less medical attendance. All expenses incurred for services of attendants and nurses and for doctors, other than Dr. Page, I find were due to the ovarian trouble and they are disallowed. 4. The services of Dr. Page, so far as they were necessary, were mainly rendered because of the condition resulting from the ovarian trouble. His attendance and treatment for the neurasthenia resulting from the accident were not such as were reasonably necessary, and tended rather to prolong and aggravate the nervous condition due to the accident rather than to help it. A certain amount of attendance and treatment were, however, necessary at the time of the accident, and because of the nervous condition due to the accident which lasted for a year or more, I find that a fair value for such services was $500."

These findings, if warranted by the evidence, as we think they were, dispose of the rulings or findings asked for. There was ample evidence from the medical experts of the defendant to sustain the finding that the ovarian cyst or tumor was not due directly or indirectly to the accident. And if the tumor was not due directly or indirectly to the accident, then the defendant was not and could not be liable as matter of law for the damages caused by it and for "the resulting surgical operation and the after condition." It was for the judge who tried the case to say in the first place what injuries resulted from the accident and what, if any, diseases were set in motion by it as the direct and efficient cause, and then to say what medical and other attendance and treatment were necessary and what the fair value of the services and treatment so rendered was. See *Hunt* v. *Boston Terminal Co.* 212 Mass. 99. By "necessary" must be understood to have been meant reasonably necessary in view of the character of the injury or disease. There was testimony from one of the defendant's witnesses who saw the plaintiff's wife shortly after the accident, that he "thought it would take her some time be-

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fore she would be well nervously; thought she would be in bed a month and ailing three or four months." Another of the defendant's witnesses who saw her on May 25, 1900, and November 18, 1903, testified that at the first visit "I was not satisfied that the nervous symptoms in the case were genuine or uncontrollable. At the next one I was very decided that, in my opinion, the manifestations were entirely within her control and had nothing to do with the original accident." The same witness testified: "I should think a liberal estimate for all those whole five years would be one visit a week; that would be a very liberal estimate." There was evidence tending to show that the last and final trial of Mrs. Whitcomb's case ended December 3, 1903, and that Dr. Page, her attending physician, made his last visit three days after. This with other evidence in the case well might have led the trial judge to doubt the genuineness of the manifestations testified to in regard to Mrs. Whitcomb's condition, and to find, if such manifestations were caused by real illness or disability, that they were due to the ovarian tumor for which she was operated upon in November, 1901, and not to the accident.

We do not discover anything which requires that the exceptions should be sustained.

Exceptions overruled.

W. B. Grant, for the plaintiff.

J. L. Hall, for the defendant.

NORMAN H. COOK & another *vs.* CHARLES J. SCHEFFREEN & others.

Suffolk. January 23, 1913. — September 11, 1913.

Present: RUGG, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Equity Pleading and Practice, Master's report: rulings on evidence, recommittal, request for report of evidence. *Equity Jurisdiction*, Rescission.

Exceptions to a master's report founded on the alleged wrongful admission or exclusion of evidence must be overruled where it does not appear from the master's report that the master admitted or excluded the evidence as alleged.

Exceptions to a master's report on the ground that certain findings are not sup-

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ported by or are contrary to the evidence must be overruled where the evidence on which the findings were made is not reported.

Where a suit in equity is referred to a master "to hear the parties and their evidence forthwith and report his findings to the court together with such facts and questions of law as either party may request," a party has a right to ask the master to report his rulings as to the admission of evidence, and a refusal of the master to report such rulings is a proper ground for recommitting his report.

Where a party to a suit in equity goes to trial before a master under an order of reference which does not direct the master to report the evidence in whole or in part, this is an acquiescence in leaving the final determination of the facts to the master, and, at least after the findings of the master have come to the knowledge of the parties through his draft report, it is too late to ask as a matter of right that the master be ordered to report the evidence or some part of it. Accordingly the denial by a trial judge under these circumstances of a motion to recommit a master's report for this purpose is a proper exercise of discretionary power.

A motion to set aside a master's report in a suit in equity for alleged errors of law and of fact is not a proper procedure. If errors of law appear in the report the remedy is by a motion to enter a decree on the report. If there are errors in conclusions of fact, and the evidence is not reported, it is too late to object to these errors after the master's report is before the court.

Where a suit in equity is referred to a master to "report his findings to the court together with such facts and questions of law as either party may request," it is no part of the master's duty to pass upon the question of law whether on the facts found by him the defendant or defendants are liable. In the present case such a ruling of a master as to the liability of one of the defendants, which had been confirmed by an order of the trial judge, was taken to have been adopted as a ruling of the judge, and was passed upon by this court for that reason.

In a suit in equity seeking to rescind an exchange of property between the plaintiffs and two of the defendants, on the ground that it was procured by the false and fraudulent representations of those two defendants and also of a third defendant, who acted as their broker in the transaction, it appeared that one of the two defendants who received the plaintiffs' property had sold a part of the property thus received by him for $8,000 before the fraud was discovered and the return of the property was demanded. *Held*, that the defendant who received and sold this part of the plaintiffs' property was liable to the plaintiffs for its proceeds, but that the defendant who acted as broker in the transaction, although he took part in the fraudulent representations and could have been held liable for the loss caused by the fraud, did not receive any part of the plaintiffs' property of which a reconveyance was sought and was not liable for the $8,000 received by another defendant for a part of this property.

BILL IN EQUITY, filed in the Superior Court on March 18, 1912, by Norman H. Cook and Ellen M. Cook, his wife, against Charles J. Scheffreen and Dora Scheffreen, his wife, and Ezra F. Pratt, to rescind an exchange of property made between the plaintiffs and the defendants Scheffreen on October 16, 1911, as described in the opinion, which it was alleged that the plaintiffs had been in-

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duced to make by the false and fraudulent representations of all the defendants.

The case was referred to Thomas L. Wiles, Esquire, as master, by an order of reference which is quoted in the opinion.

A motion of the defendants to recommit the master's report was denied by *Pierce*, J.

Later the case was heard by *Morton*, J., upon the defendants' exceptions to the master's report, and upon a motion of the defendants "to review and set aside" certain parts of the master's report. The judge made an interlocutory decree overruling the defendants' exceptions to the master's report and confirming the report. He also denied the defendants' motion. Being of opinion that the interlocutory decree and the denial of the motion so affected the merits of the controversy that the matter before further proceedings ought to be determined by this court, he reported the case for such determination. It was stipulated by the parties that, if this court should sustain the rulings of the judge, the case should be referred to a master for an accounting from and after October 16, 1911, and that the final decree should await such accounting; otherwise, such order was to be made as justice might require.

A. H. Russell, for the plaintiffs.

S. A. Fuller, for the defendants.

LORING, J. This is a bill to set aside for fraud an exchange of property between the plaintiffs, who are husband and wife, and the defendants, two of whom also are husband and wife. The facts of the case appear from the master's report to be in substance as follows:

On October 11, 1911, Norman Cook, owning a farm in Barre, and his wife Ellen, owning (1) the live stock, tools and like personal property used in connection with it, and also (2) a cottage on an island in Casco Bay in the State of Maine, were induced to exchange these properties for an apartment house in Boston owned by the defendant Charles Scheffreen, and to give to him notes in the aggregate sum of $20,000 secured by a second mortgage on it (the apartment house). The master found that the plaintiffs were induced to make the exchange by false and fraudulent representations made by Charles Scheffreen and the defendant Pratt, his broker in the exchange, but that these representations were

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not made pursuant to a conspiracy so to do, as alleged in the bill. It appeared that the fraud was not discovered until February 1, 1912, or thereabouts, a month or so before this bill was filed. The stock and other personal property had been sold at auction by Scheffreen for less than their fair market value (which was $8,000), and the master found that Scheffreen and Pratt owe the plaintiff that sum with interest from October 11, 1911.

Of the twenty-three exceptions taken by the defendants to the master's report the first ten are to the alleged admission or exclusion of testimony. Apart from the motion to recommit which is hereinafter considered, these exceptions could not be sustained because it does not appear from the master's report that the evidence which the defendants allege was admitted or excluded against their objection was admitted or excluded by him. *O'Brien* v. *Keefe*, 175 Mass. 274. *Smith* v. *Butler*, 176 Mass. 38. *Long* v. *Athol*, 196 Mass. 497.

The remaining thirteen exceptions are to certain findings of the master on the ground that they are not supported by or are contrary to the evidence. But, the evidence on which these findings were made not being before us, these exceptions must be overruled. *Henderson* v. *Foster*, 182 Mass. 447, 448. *East Tennessee Land Co.* v. *Leeson*, 183 Mass. 37. *Burke* v. *Dorey*, 208 Mass. 45. *Crosier* v. *Kellogg*, 210 Mass. 181. *Attorney General* v. *Vineyard Grove Co.* 211 Mass. 596, 597.

The defendants also made a motion to recommit the report for various reasons, and among others because the master had not set forth in his report the rulings made by him as to the admission of testimony, which rulings were the subject of exceptions by the defendants. By the terms of the order of reference the master was directed "to hear the parties and their evidence forthwith and report his findings to the court together with such facts and questions of law as either party may request." Under this form of reference the defendant had a right, upon requesting the master so to do, to have him report to the court all questions of law which arose in the course of his doing what he was ordered to do, namely, to find the facts. This included rulings as to the admission of evidence. In place of making such request of the master the defendants objected and excepted to his report because of incorrect rulings as to the admission of evidence, and asked to have the re-

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port recommitted because he had not set forth those rulings in his report. The provision in the master's report which we have just referred to was inserted in the order of reference to give to the parties a right to have all rulings of law made by the master in finding the facts (including his rulings as to the admission of evidence) passed upon by the court. The defendants should have requested the master to report to the court the rulings of law made by him as to the admission of evidence. And they have done that in substance although not in form. So far as this reason for recommitting the report is concerned the motion should have been granted.

Another ground on which the defendants asked to have the report recommitted to the master was because he had not reported the testimony on which he made the findings of fact objected to by them, and because they wished all the evidence introduced before the master reported to the court. When a party goes to trial before a master under an order of reference which does not direct him to report the evidence in whole or in part, it is too late to ask that that be done, at least after the terms of his draft report have come to the knowledge of the parties. The purpose of such an order of reference is to leave to the master the final determination of the facts, and there is no justice in giving to the unsuccessful party who has taken his chances of a final determination in his favor an opportunity to try over again before the court the facts which were to be finally determined by the master. That has long been the settled rule of this court. See for example *Nichols* v. *Ela*, 124 Mass. 333; *Parker* v. *Nickerson*, 137 Mass. 487; *Moore* v. *Dick*, 187 Mass. 207; *Eddy* v. *Fogg*, 192 Mass. 543, 544. A recommittal for this purpose under these circumstances is in the discretion of the single justice, and there is nothing to indicate that it was wrongly exercised.

The other reasons for recommitting the report were addressed to the discretion of the trial judge and we see no error in the exercise of it by him.

In addition to a motion to recommit the defendants filed a motion to have certain portions of the master's report set aside on the ground that they were wrong, some of them in law and some in fact. This was denied. So far as this motion is founded on the ground that the portions referred to were wrong in law, the de-

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fendants' remedy was to argue that on a motion to enter a decree on the master's report. A motion to set them aside is not the proper procedure. So far as this motion is founded on wrong conclusions of fact, the evidence on which they were founded was not before the court and the defendants had no right, at least after the coming in of the master's report, to have it brought before the court. That already has been determined. This motion was properly denied.

There is however one ruling of law made by the master which was wrong. The order to the master did not direct him to pass upon and report to the court upon the merits of all issues raised by the pleadings, as is sometimes done. See for example the order of reference made in *Warfield* v. *Adams*, *post*, 506. All that the master was ordered to do was to "report his findings to the court together with such facts and questions of law as either party may request." In case of such an order it is no part of the master's duty to pass upon the question of law, whether on the facts found by him the defendant or defendants are or are not liable. See *Clark* v. *Seagraves*, 186 Mass. 430; *Adams* v. *Young*, 200 Mass. 588; *New England Foundation Co.* v. *Reed*, 209 Mass. 556. But in the case at bar the master's report containing this ruling of law was confirmed by the Superior Court and therefore the master's ruling well might be taken to have been adopted by the court. For that reason we proceed to consider it.

The master ruled that Pratt was liable to the plaintiff Ellen M. Cook for $8,000, the value of the stock, tools and other personal property which she was induced by his [Pratt's] false representations to exchange for property conveyed to her husband by the defendant Charles L. Scheffreen. This is a bill in which, on rescinding this exchange of property because of the fraud of Scheffreen and Pratt, the plaintiffs offered to return the property conveyed to them and sought to obtain a reconveyance to themselves of the property conveyed by them to Scheffreen. The stock, tools and other personal property used on the farm had been sold by Scheffreen (to whom they were transferred) before the fraud committed by him and Pratt was discovered; on the plaintiffs electing to rescind under these circumstances Scheffreen is liable for the value of the stock, tools and other personal property sold by him. But, although the transfer of this personal property by

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the plaintiffs to Scheffreen was induced by Pratt's fraudulent representations, and although he is liable for them to the plaintiff Ellen M. Cook, he is not liable for this $8,000 into which this personal property in legal contemplation had been converted by Scheffreen before the fraud committed by him and by Pratt was discovered. Pratt's liability for the fraudulent representations made by him, if the plaintiffs had not elected to rescind, would have been the difference between the value that the apartment house would have had if his representations had been true, and the value it in fact had. But in electing to rescind, the plaintiffs elected not to enforce that liability against Pratt and so elected not to proceed against him at all.

The order refusing to recommit the master's report in order that he should state the rulings of law made by him is reversed, and an order should be entered recommitting the report to the master to state the rulings of law made by him on the admission of evidence. The order overruling the exceptions taken to the admission and exclusion of evidence by the master is reversed and those questions are to be left open for decision on the coming in of the master's supplemental report. The order confirming the master's report is reversed as to the foregoing matters, which matters are to stand for further hearing as aforesaid, and the last order is further reversed as to the liability of Pratt for the sum of $8,000. It is

So ordered.

WILLIAM A. SWEET *vs.* POST PUBLISHING COMPANY.

Norfolk. March 6, 1913. — September 11, 1913.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DE COURCY, JJ.

Libel and Slander, Privileged communications, Damages. *Damages*, In tort. *Attorney at Law.*

In order that a report in a newspaper of an indictment found by a grand jury should constitute a privileged communication, for which the publisher cannot be held liable in an action of tort for libel, such report not only must be fair and impartial but also must be accurate.

In an action of tort, by an attorney at law against the publisher of a newspaper,

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for an alleged libel in publishing an article purporting to give the names of six persons indicted by a grand jury and afterwards arrested for conspiracy to defraud persons unknown, naming the plaintiff as one of the persons indicted and arrested and further describing the plaintiff as to his age, residence and profession, it is no defense that the defendant by an honest mistake referred to and described the plaintiff instead of another person of a similar name, that the defendant exercised reasonable care and diligence in trying to ascertain the facts before publishing the report and that the mistake occurred in spite of such care and diligence. Whether evidence of such care and diligence would be admissible in mitigation of damages was not considered.

In an action of tort, by an attorney at law against the publisher of a newspaper, for an alleged libel in publishing an article purporting to give the names of six persons indicted by a grand jury and afterwards arrested for conspiracy to defraud persons unknown, falsely naming the plaintiff as one of the persons indicted and arrested and identifying him by description, the plaintiff, if he prevails, may recover damages, under appropriate allegations in his declaration, for mental suffering and distress, for illness suffered by him in consequence of the libel, for loss of reputation in his profession and for loss of business.

MORTON, J. This is an action of tort to recover damages for the publication of an alleged libel upon the plaintiff, an attorney at law, in the "Boston Post" of August 13, 1907, a newspaper published by the defendant. The article complained of purported to give the names of six persons, who had been indicted by the Suffolk County grand jury for conspiracy to defraud persons unknown, and circumstances connected with their arrest. Amongst the names given as those of the persons indicted and arrested was that of the plaintiff. There was also a paragraph in the same article giving particulars as to the age, residence and profession of "Mr. Sweet," which was descriptive of the plaintiff in the particulars mentioned. The article was printed in what may be fairly described as a highly sensational manner. The declaration was in three counts. The first count was in the statutory form. The second and third counts averred that the plaintiff was an attorney at law and that the alleged libel had greatly injured him in his reputation and had caused him great loss and damage in his profession. The answer admitted publication but denied any malice, and set up in substance that the article was published with reasonable care, on a privileged occasion, about another person whose name was similar to that of the plaintiff, but that in spite of such care a mistake occurred and that on discovering the mistake the defendant promptly published a retraction.

There was a verdict for the plaintiff and the case is here on ex-

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ceptions by the defendant to a matter of evidence and to the refusal of the presiding judge * to give certain rulings asked for and to certain instructions that were given.

It was stated at the trial by the plaintiff's attorney that no claim of express malice was made.

The principal contention of the defendant is that the occasion was one of privilege or qualified privilege, and that it is not liable for the consequences of a mistake honestly made in a *bona fide* attempt, in the exercise of reasonable care and diligence, to get at the facts for publication.

The investigation and report by the grand jury constituted a judicial proceeding, and, in the absence of express malice, a fair and correct report of it by the defendant in the newspaper published by it was privileged. *Cowley* v. *Pulsifer*, 137 Mass. 392. *Kimball* v. *Post Publishing Co.* 199 Mass. 248. The privilege attaching to such a report rests, however, upon a somewhat different ground from that on which privileged communications between private persons rest. In them the person making the communication has an interest to protect or a duty to perform, or his relation to the party to whom the communication is made is of a confidential nature, and the law holds that in such cases, if what is said or written is communicated in good faith, in the belief that it is true, and with no malevolent motive and for the purpose of protecting or promoting his interest, or in the performance of a duty incumbent upon him social or legal or moral, and is justified or required by the nature of the relations existing between him and the person to whom the communication is made, and does not go beyond what is fairly warranted by the occasion, the communication is privileged. But no duty rests upon the publishers of a newspaper to report judicial proceedings, and their interest in such matters is only that which all the rest of the community has. It is for the interest of every one that crime should be detected and punished, and every one has the highest interest in whatever pertains to the proper administration of justice. It is upon these grounds that reports of judicial proceedings fairly and correctly made are privileged. *Cowley* v. *Pulsifer*, 137 Mass. 392. *Kimball* v. *Post Publishing Co.* 199 Mass. 248. *Kimber* v.

* *Stevens*, J.

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Press Association, [1893] 1 Q. B. 65. In order to be privileged such reports must be not only fair and impartial, but they also must be accurate. The same principle which requires that they should be fair and impartial requires that they should be accurate, at least in regard to all material matters. *Kimber* v. *Press Association*, *supra*. A distorted report cannot in the nature of things form the basis for a correct judgment. In a sense it may make no difference to the public so far as the course of judicial proceedings is concerned, whether it is John Smith or John Jones who is arrested. But the administration of justice would be a farce or worse than a farce if the guilty escaped and the innocent were punished, or if the rights of parties were determined in a manner in which according to plain principles of justice they should not be. It is of the highest consequence therefore, in order to enable the public to judge rightly, that a report of judicial proceedings should be not only fair and impartial but should be accurate also. The importance of a full and correct statement in regard to legal matters is well illustrated in actions for malicious prosecution where the defense relied on is that in procuring the arrest the defendant acted upon the advice of counsel. See *Black* v. *Buckingham*, 174 Mass. 102. If the report had to be accurate, then the defendant is not protected by the alleged privilege. For, admittedly, the plaintiff was not the person indicted. Nor can the defendant avail itself of the doctrine laid down in *Hanson* v. *Globe Newspaper Co.* 159 Mass. 293, that in order to render a defendant liable the libel must have been published of and concerning the plaintiff, and it is not to be deemed to have been so published if through mistake another person than the one intended is named. It was in effect conceded at the trial that the plaintiff was the person meant although the naming of him was due to a mistake, and the presiding judge so stated in his charge without any objection being made thereto.

The defendant contends, however, that it is not liable and is entitled to avail itself of the privilege extended to fair, impartial and accurate reports of judicial proceedings if it exercised reasonable care and diligence in endeavoring to ascertain what the facts were before it published the report, and the mistake occurred in spite of such care and diligence and was an honest mistake. It would seem that that defense was disposed of, so far at least as this Com-

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monwealth is concerned, by the case of *Burt* v. *Advertiser Newspaper Co.* 154 Mass. 238, where it was held that the privilege did not extend to statements made with reasonable cause to believe them to be true. As was said in that case, "A person publishes libellous matter at his peril." A newspaper as a purveyor of news and information of interest to the public stands no differently in respect to liability from any other medium of communication. As was said by Coleridge, J., in *Davison* v. *Duncan*, 7 El. & Bl. 229: "There is no difference in law whether the publication is by the proprietor of a newspaper or by some one else. There is no legal duty on either to publish what is injurious to another; and, if any person does do so, he must defend himself on some legal ground." St. 1901, c. 322, providing that in actions for libel or slander the defendant may show acts of the plaintiff creating reasonable suspicion of the truth of the matters charged, manifestly has no application to this case. No doubt when a person acts in the performance of a duty or in regard to a matter where his interest is involved, he may justify by showing that he had reasonable and probable cause to believe what he published and that he acted *bona fide* and in the belief that what he published was true. In such a case he will be protected by the privilege which attaches to what he publishes from the consequences of an honest mistake. It is on that ground that the case of *Douglass* v. *Daisley*, 114 Fed. Rep. 628, rests, as we understand it. In the present case, however great the interest of the public in the doings of the grand jury might have been, there was, as already observed, no duty legal or social or moral resting upon the defendant to publish a report of them, and it had no such legal interest to be protected or promoted as to justify it in the publication of what otherwise would be a libel. It does not follow that because the public had an interest in knowing what the grand jury did that it was the defendant's duty to inform them. In *O'Connell* v. *Boston Herald Co.* 129 Fed. Rep. 839, also relied on by the defendant, the question was whether in a report of judicial proceedings published in a newspaper, the reporter, for the purpose of showing that the report was accurate, could introduce the opinion of this court that was rendered in *O'Connell* v. *Dow*, 182 Mass. 541, from which the statement, or one of the statements that were objected to was taken. It would seem clear that the opinion was admissible as

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the court held that it was. See *Hood* v. *Hood*, 110 Mass. 463; also *Mangena* v. *Wright*, [1909] 2 K. B. 958, 977. In *Briggs* v. *Garrett*, 111 Penn. St. 404, also relied on by the defendant, and followed in *Conroy* v. *Pittsburgh Times*, 139 Penn. St. 334, and *Ferber* v. *Gazette & Bulletin Publishing Association*, 212 Penn. St. 367, there was a vigorous dissenting opinion by the Chief Justice and two associate justices which commends itself to us as expressing the correct view. There is no doubt that when required to do so private interests must yield to the public advantage. And if we go back over a long term of years, especially in England (see *Allbutt* v. *General Council of Medical Education & Registration*, 23 Q. B. D. 400; *Wason* v. *Walter*, L. R. 4 Q. B. 73) an increasing disposition is manifested to enlarge the protection afforded by privilege by broadening the field as to matters that may be properly published for the public information. A liberal rule in regard to such publications has long prevailed in this Commonwealth. See *Barrows* v. *Bell*, 7 Gray, 301, 313. But the right of the private citizen to be secure in his reputation always must remain one of the most sacred of rights. We discover no error in the manner in which the presiding judge dealt with the matter of privilege and liability in his charge, or in the way in which he dealt with the requests for rulings so far as they related to or bore upon that matter.

It follows from what has been said that the evidence which was offered of the examination of the city directory by the night city editor "as bearing upon the care which we took in and about the publication of this article" was rightly excluded. Whether it would have been admissible on the question of damages it is not necessary to consider. The purpose for which it was offered was limited to that expressed above, and the ruling was based on its competency for that purpose.

We do not discover any error in the manner in which the presiding judge dealt with the question of damages. The second count alleged that the plaintiff was an attorney and counsellor at law, engaged in the practice of his profession in Hyde Park and in the city of Boston, and particularly in the counties of Suffolk, Norfolk and Middlesex, and that by reason of the publication of said article he had suffered great pecuniary damages and loss of business and had been greatly injured in his feelings and in his

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reputation in his profession. The third count alleged that the plaintiff was an attorney and counsellor at law engaged in the practice of his profession in the city of Boston, Hyde Park and other places in this Commonwealth, and that the publication of said libel and the matters and things contained in said article had caused him great loss in his professional business, greatly injured his feelings and his reputation in his profession, had deprived him of professional business, had caused the withdrawal of professional business from him and had put him to great trouble and expense to refute said charges. Neither count was demurred to.

Under these counts the plaintiff was entitled to recover for mental suffering and distress and for illness suffered by him in consequence of the libel, for loss of reputation in his profession, and for loss and withdrawal of business. It is immaterial, it seems to us, whether the damages which the plaintiff was entitled to recover be called general or special. So far as there was any evidence tending to show particular instances of damage it was brought out by the defendant itself without objection on cross-examination of the plaintiff. The case is fully covered we think on this branch of it by *Parker* v. *Republican Co.* 181 Mass. 392, and *Morasse* v. *Brochu*, 151 Mass. 567.

Exceptions overruled.

J. T. Pugh, for the defendant.
C. R. Elder, for the plaintiff.

EMERY B. MOORE & another, trustees, *vs.* WILLOUGHBY H. STUART & another.

Suffolk. March 10, 1913. — September 11, 1913.

Present: RUGG, C. J., HAMMOND, LORING, SHELDON, & DE COURCY, JJ.

Practice, Civil, Withdrawal of plea of statute of limitations, Exceptions. *Limitations, Statute of.*

The defendant in an action of contract may withdraw a plea of the statute of limitations.

Whether a party to an action by his testimony at a trial before a jury has withdrawn a plea of the statute of limitations is a question of law for the presiding

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judge and not a question of fact for the jury, because it is the duty of the court to determine what the pleadings are which present the issues of fact for the jury to pass upon.

If the plaintiff in an action of contract, in which the defendant has pleaded the statute of limitations, thinks that the defendant by his testimony at the trial has withdrawn the plea of the statute and that in spite of such withdrawal the defendant's counsel is insisting on that defense, the remedy of the plaintiff is to file a motion to strike out the plea, and the judge then can decide whether the plea has been withdrawn.

In an action of contract against two defendants jointly, one of the defendants pleaded the statute of limitations. The plaintiff contended that this defendant by her testimony at the trial had waived that defense. The judge left it to the jury to say whether this defendant had waived the statute of limitations, and the jury by returning a general verdict for this defendant found that she had not waived the defense of the statute. The plaintiff excepted to the refusal of the presiding judge to give the jury certain instructions on that question. *Held*, that the finding of the jury upon the question whether the defendant had waived the defense of the statute of limitations was a nullity which could not affect the plaintiff's rights, because this was not a question for the jury, and that for this reason all exceptions relating to that finding must be overruled.

LORING, J. The declaration in this action contained three counts. In the first the plaintiff counted on a note for $13,189.34 dated October 3, 1889, due December 3, 1893; in the second he counted on an agreement dated October 4, 1889, to pay that note and two other notes (one for $5,400 and the other for $5,426) before they fell due; and in the third he counted on an agreement dated January 17, 1896, extending payment of all three notes to January 1, 1899. The writ was dated November 2, 1904. The action was a joint action against both Mr. and Mrs. Stuart, and all the notes and agreements purported to be signed by both. Mrs. Stuart denied her signature to the agreement in the third count, contended that the note sued on for $13,189.34 was given as collateral for the two notes of $5,400 and $5,426, which it was admitted had been paid, and in addition she pleaded the statute of limitations. Verdicts on all the counts were found in favor of Mrs. Stuart and for the plaintiff as against Mr. Stuart. It is apparent from this (1) that the jury found that the note sued on was not given as collateral for the other two notes; (2) that the jury believed Mrs. Stuart when she testified that she did not sign the agreement relied on in the third count; and (3) that the verdict in her favor was founded on the defense of the statute of limitations.

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At the trial, in answer to the question (put by her own counsel) whether or not she had instructed her counsel to pay any of these notes, she testified, "I did, all that bore my signature." On cross-examination she testified that the note sued on in the first count did bear her signature and that she did not wish to take advantage of its being an old note. On re-direct she testified that if it had been paid once she did not wish it paid again.

At the conclusion of the testimony the plaintiff asked for the following rulings: "4. As to the first count of the plaintiffs' declaration, the defendant Susan M. Stuart having waived the statute of limitations as a defense in open court, she cannot take advantage of said statute. 14. The statute of limitations is a defense which goes to the remedy and not to the cause of action and the same may be waived by the person entitled to plead the same. If a person so testifies as to lead the jury to believe that she does not rely upon the statute of limitations, then the jury have the right to find that such defense has been waived. 15. If the defendant Susan M. Stuart shall be found by the jury to have waived the benefit of the statute of limitations the original note for $13,189.34 admittedly signed by her is not now barred by said statute of limitations and on this aspect of the case the question as to whether or not Exhibit 104 was signed by her is immaterial."

The judge * left it to the jury to say whether Mrs. Stuart had waived the statute of limitations and in that connection instructed them that "with respect to the conduct of this case [she] is in the hands of her counsel Mr. Morse. It appears from the closing argument of Mr. Morse that he does not waive the defense of the statute of limitations, and if you find that Mr. Morse is acting in accordance with her instructions, you will be authorized to find that she has not waived the statute of limitations."

The case is here on exceptions to the refusal to give the rulings asked for and to the ruling given.

The evidence relied on by the plaintiff, if it showed anything, showed a withdrawal of the plea of the statute as distinguished from a waiver of it. Of course a client can withdraw a defense pleaded by his attorney, as was decided in *Lewis* v. *Buckley*, 73 Miss. 58. But the question whether a client has or has not done so

* *Fox, J.*

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is a question for the court, not for the jury. It is the province of the jury to decide the issues of fact raised by the pleadings; but it is for the court to determine what the pleadings in the case are. See *Marshall* v. *Morissey*, 6 Ill. App. 542.

If the plaintiffs thought that Mrs. Stuart had in fact withdrawn the plea of the statute and that in spite of her withdrawal of that defense her attorney persisted in setting it up in her behalf, their remedy was to file a motion to strike out that plea. And, as we have said, it would have been for the court to decide whether that motion should or should not be granted.

In the case at bar no such motion was made, and the question whether the plea had or had not been withdrawn was not raised. At the trial of the issues raised by the pleadings (including this defense of the statute of limitations) some evidence crept in which would have been relevant to that question if it had been raised. But it is manifest that that question was not thoroughly tried. For example, the matter alluded to by the presiding judge (when he instructed the jury on this point) was a matter on which direct evidence should have been given and doubtless would have been given had the question been raised properly and a thorough trial of it had.

The finding of the jury on this question should be disregarded as a nullity and all the exceptions with respect to it must be overruled for that reason.

It should be added that, if the question had been raised, the evidence as matter of law did not require a finding in the plaintiffs' favor. It well might have been found that Mrs. Stuart insisted upon pleading the statute to the claim on the note because she believed that it had been discharged by payment of the two notes for $5,400 and $5,426, respectively, for which she believed the note sued on was given as collateral security, although the jury by their verdict against Mr. Stuart subsequently found otherwise on that point.

The entry must be

Exceptions overruled.

H. D. McLellan, for the plaintiffs.

R. M. Morse, for the defendants.

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MARY G. THOMSON *vs.* AMERICAN FIDELITY COMPANY.

Suffolk. June 10, 1913. — September 11, 1913.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DE COURCY, JJ.

Agency, Scope of authority. *Insurance*, Authority of agent. *Waiver*.

Evidence, tending to show that a certain person was licensed by the insurance commissioner as the agent in this Commonwealth of an insurance company incorporated in another State, that he was the manager for eastern Massachusetts for that company and that, as to claims under policies of the company, he had no authority to pay a claim but had authority only to report to the home office of the company and receive instructions from there, will not warrant a finding that such agent had authority, without instructions from the home office, to waive a provision of a policy providing that no legal proceedings should be commenced under the policy until after three months from the filing of a proof of loss, especially where the policy also provided that no waiver should affect the conditions of the policy unless the company's assent thereto was indorsed on the policy and was signed by one of several specified officers other than such agent.

CONTRACT upon a policy of accident insurance. Writ dated January 16, 1909.

In the Superior Court the case was tried before *Wait*, J. The material facts are stated in the opinion. At the close of the evidence, the judge ordered a verdict for the defendant; and the plaintiff alleged exceptions.

The case was submitted on briefs.

D. H. Coakley & R. H. Sherman, for the plaintiff.

W. B. Sprout & F. B. Kendall, for the defendant.

DE COURCY, J. The insured, Thomas J. Thomson, died on the fourth day of November, 1908, and this action on the policy of accident insurance issued to him was brought by the beneficiary on the sixteenth day of January, 1909. There was evidence that notice of the accident on one of the blanks furnished by the agent John Paulding Meade, was served on Meade on the eighteenth day of December, 1908.

Provision Five of the General Agreement of the policy is as follows: "No legal proceedings shall be commenced until after three months from the filing of the proof of loss at the Home Office of the company, nor after two years from the date of death, loss

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of limb or sight, or termination of disability." This clause furnishes a complete defense to the present action unless the defendant has lost the right to rely thereon by reason of a waiver on its part. *Bryant* v. *Commonwealth Ins. Co.* 6 Pick. 130, 131. *Carlson* v. *Metropolitan Life Ins. Co.* 172 Mass. 142. *Lewis* v. *Metropolitan Life Ins. Co.* 180 Mass. 317.

The plaintiff contends that there was evidence from which the jury could find that the agent Meade denied liability on the part of the company and thereby waived the provision in question. *Little* v. *Phœnix Ins. Co.* 123 Mass. 380. *Whitten* v. *New England Live Stock Ins. Co.* 165 Mass. 343. The difficulty is that on the evidence in the case Meade had no authority to waive the provisions of the policy. The only evidence as to his authority was the certificate of the insurance commissioner that Meade "was licensed as an agent of the American Fidelity Company of Montpelier, Vermont," and the testimony of Meade when called by the plaintiff. So far as material to this issue his testimony in substance was that he was the eastern agent or manager for eastern Massachusetts for the defendant company; that he had no authority on behalf of the company, in a case of this kind, except to report to the home office and get instructions from them; and that he had nothing to do about payment of a death claim. Furthermore it is provided in the eighth paragraph that "no modification or waiver shall affect or change the terms or conditions of this policy unless the consent of the company to such . . . modification or waiver is indorsed hereon and signed by the president, one of the vice-presidents or one of the secretaries of the company."

As there was no evidence that Meade was authorized or held out as having authority to waive the provision in the policy referred to, and there has been no ratification by the company of any waiver by him, the action was brought prematurely. This renders it unnecessary to consider the other defenses relied on.

Exceptions overruled.

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NATURAL AUTOFORCE VENTILATOR COMPANY *vs.* CHARLES G. WINSLOW.

Suffolk. January 15, 1913. — September 12, 1913.

Present: RUGG, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Conversion. Personal Property. Landlord and Tenant.

Where, at the trial before a judge without a jury of an action of tort against the owner of a building for the alleged conversion of a ventilator and pipe attached thereto, it appears that the ventilator was thirty-five feet long and had been attached to the outside of the building under a contract between the plaintiff and a tenant in the building, that, without the knowledge of the defendant, the plaintiff and the tenant had agreed that the plaintiff should retain title to the property until it was paid for, that the property was fastened to brick work of the building by a considerable number of bolts and rivets, and that it remained attached to the building after the termination of the tenancy, the judge cannot be required as a matter of law to find and rule that the ventilator and pipe were personal property, and a finding for the defendant is warranted.

TORT for the alleged conversion of "one sixteen inch Natural Autoforce Ventilator and about forty feet of sixteen and twelve inch galvanized steel pipe." Writ in the Municipal Court of the City of Boston dated January 7, 1909.

On appeal to the Superior Court, the case was heard by *Raymond*, J., without a jury, who refused to grant certain requests of the plaintiff for findings and rulings, and found for the defendant. The plaintiff alleged exceptions.

The case was submitted on briefs.

P. J. Lane, for the plaintiff.

F. O. White, for the defendant.

RUGG, C. J. The defendant is the owner of a building of a part of which one Rose, a restaurateur, was tenant. The plaintiff, by virtue of a contract made with Rose, during his term installed a ventilator which was about thirty-five feet long and extended from the kitchen on the first floor on the outside of the building to its top. The main part of it was sixteen inches to eighteen inches in diameter, and was fastened to the brick work of the building by an considerable number of bolts or rivets. By an agreement

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between the plaintiff and Rose the ventilator was to remain the property of the plaintiff until paid for, but the judge refused to find that this was with the knowledge or consent of the defendant, and the contrary must be assumed. The ventilator remained upon the premises after the termination of the tenancy of Rose.

The only exceptions now relied on in substance relate to the refusal of the trial judge to find as a fact and rule as matter of law that the ventilator and its several parts were personal property. Plainly this ruling could not have been given nor was such finding required in law. There was a substantial attachment of the apparatus to the building. Generally whether an article has become so affixed to the building as to become a part of it is a mixed question of law and fact. *Houle* v. *Abramson*, 210 Mass. 83. Giving due weight to the favor with which the law regards the tenant as respects fixtures, there is nothing to take the case at bar out of that general rule. It cannot be said as matter of law that this was a personal furnishing removable as would be an article of ornament or domestic utility. There is some evidence to indicate that its use was intended to be restricted to the building to which it was fastened. If the ventilator be treated as a trade fixture, it was not removed during the term and hence, upon expiration of the term, if attached to the building, became a part of the freehold. *Talbot* v. *Whipple*, 14 Allen, 177.

Exceptions overruled.

DORIS I. SHEEHAN *vs.* BOSTON AND NORTHERN STREET RAILWAY COMPANY.

ROBERT F. SHEEHAN *vs.* SAME.

Essex. January 16, 17, 1913. — September 12, 1913.

Present: RUGG, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Negligence, In use of highway, Street railway. *Evidence*, Presumptions and burden of proof. *Practice, Civil*, Judge's charge.

At the trial of an action of tort against a street railway company for personal injuries sustained by a girl eight and one fourth years of age from being run into by a car of the defendant, there was evidence that the girl, intending to

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cross a street, upon which the defendant's cars ran, at a place other than a cross walk and in a diagonal direction to go to a certain store, stopped at the curb and looked up the street, that she saw a car between one hundred and twenty and one hundred and forty feet away, which appeared to her to be standing still, that she then stepped into the street and again looked toward the car and thought that it continued to stand still, that she thought she had time to cross the street, proceeded across, was struck by the car and was injured. There also was evidence that the car had not stopped, but merely had slackened its speed to take aboard a conductor who was off duty and with whom thereafter the motorman talked and laughed as the car proceeded at a rapid rate toward the girl, no warning by gong or bell being given, and that, when the car was almost upon her, the motorman shouted and she stopped in front of the car and became confused. *Held*, that there was evidence of due care on the part of the girl.

At the trial of an action against a street railway company to recover for personal injuries sustained by a girl eight and one fourth years of age from a car of the defendant running into her as, at a place other than a cross walk, where the sidewalk was sixteen to eighteen feet from the car track, she was crossing a street when she saw the car something over one hundred feet away, the defendant is entitled to have the jury instructed that the plaintiff had "no right to assume that the motorman would look out for her safety to the extent that she was relieved from taking any precautions whatever for her own safety while walking a distance of sixteen to eighteen feet."

TWO ACTIONS OF TORT for personal injuries caused by the plaintiff in the first action being run into by a street railway car of the defendant as she was crossing Washington Street in Haverhill. The second action was by the father of the plaintiff in the first action for consequential damages. Writs dated October 4, 1910.

In the Superior Court the cases were tried together before *Keating*, J. The material facts are stated in the opinion. At the close of the evidence, the defendant asked for the rulings described in the opinion.

The third ruling asked for was as follows: "The burden of proof is upon the plaintiff, and the obligation of proving, by a preponderance of the evidence, all the essential elements of her case rests upon the plaintiff to the same extent as if she were an adult." Commenting upon the request, the judge stated to the jury: "That is true, gentlemen, except that the care that this plaintiff is expected to exercise is not the same care that an adult would be expected to exercise, as I have explained to you I think. If the plaintiff was an adult, then she would be expected to exercise such care as an ordinarily prudent adult would be likely to exercise under similar circumstances, but in this case the degree of care to which this plaintiff is held is such care as an ordinarily

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prudent child of the age of eight years and three months, and of average intelligence, would be likely to exercise under circumstances like those in this case."

After the counsel for the defendant had called to the judge's attention an alleged misstatement of the evidence in the charge, the judge instructed the jury as follows: "My purpose, gentlemen, in stating to you the evidence was simply to aid you in arriving at a just verdict, but you are the judges of the evidence, it is for you to say what the evidence was, and if your recollection of it does not coincide with mine, then you may disregard what I have stated the evidence to be and rely upon your own recollection of it because, as I have said to you, you are the judges of the evidence."

The jury found for the plaintiff in the first case in the sum of $7,000 and for the plaintiff in the second case in the sum of $1,750. The defendant alleged exceptions.

J. P. Sweeney, for the defendant.

H. J. Cole, for the plaintiffs.

MORTON, J. These two actions were tried and have been argued together. The first is to recover for injuries sustained by the plaintiff, a minor eight years and three months of age at the time of the accident, in being run over on Washington Street, Haverhill, in June, 1910, by a car operated by the defendant. The second is by her father to recover for the expenses to which he was put by reason of the injuries sustained by his child. There was a verdict for the plaintiff in each case, and the cases are here on exceptions by the defendant to the refusal of the presiding judge to give certain rulings that were requested, to the exclusion of certain evidence, and to a portion of the charge. The defendant conceded that there was evidence of negligence on the part of the motorman. We shall speak of the plaintiff in the first action as the plaintiff.

The first ruling requested was in substance that the plaintiff was not in the exercise of due care and that a verdict should be directed for the defendant. We think that the ruling was rightly refused. There was evidence tending to show that at the time of the accident the plaintiff was walking diagonally across the street towards the store of one Cheinstein, to which she was going on an errand for her mother. The plaintiff testified that before she stepped off the sidewalk she stopped and looked in the direction

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in which the car was coming, and the car seemed to her to be stopped at a distance which the evidence tended to show was from one hundred and twenty to one hundred and forty feet away, and that as she stepped into the street she stopped and looked again and the car seemed to her then to be stopped; that she thought that she had time to cross and walked fast towards Cheinstein's store and that that was the last she remembered. There was other evidence tending to show that the car slowed down to take in a passenger at a point, as could have been found, not far from where the plaintiff thought it had stopped, and which might have been deemed sufficient to justify her in thinking that it had stopped, and then went on "faster than usual," as one witness testified, and "faster than I ever travelled before," as another witness testified; that no bell or gong was rung; that the motorman was talking and laughing with the passenger who had just got on, a conductor in the defendant's employ, and did not see the plaintiff until within a few feet of her when she was on the track, and that he then shouted and the plaintiff stopped and appeared to be excited and trembling, and "before she had a chance to move the car struck her." It is plain, we think, that on this evidence, which was contradicted and which it was for the jury to say whether they believed or not, the question of the plaintiff's due care was for the jury. It is not contended that the plaintiff was not of sufficient age, intelligence and experience to be sent alone on the errand. See *Harrington* v. *Boston Elevated Railway*, 214 Mass. 563; *Purcell* v. *Boston Elevated Railway*, 211 Mass. 79.

But we think that the second ruling requested and refused should have been given and that the exception to the refusal to give it must be sustained. The ruling requested was that "The plaintiff has no right to assume that the motorman would look out for her safety to the extent that she was relieved from taking any precautions whatever for her own safety while walking a distance of sixteen or eighteen feet." The distance specified in the ruling requested was the distance between the sidewalk and the track. The plaintiff had a right to rely to a reasonable extent upon the motorman's exercising due care. But it could not be held or ruled as matter of law, as was in effect done by refusing the ruling, that in passing over the distance between the sidewalk and the track she had a right to rely to such an extent upon the motorman's

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exercising due care as to excuse her from taking any precautions whatever for her own safety; in other words, that she had a right to rely wholly and exclusively upon the assumption that the motorman would look out for her. She was bound to take such reasonable precautions as to her own safety at all times as a child of her age was capable of taking; and it was a question for the jury whether she did or did not take such precautions. There was evidence which made the ruling requested applicable, and the attention of the jury does not seem to have been directed in any portion of the charge or otherwise to the phase of the case covered by the ruling requested. We think, therefore, for the reasons stated, that this exception must be sustained.

The third and last ruling requested relates to the burden of proof, which the trial judge gave with certain explanations concerning the degree of care required of the plaintiff in view of her age. We discover no error in the manner in which the judge dealt with this ruling. The exception to the charge cannot be sustained. If there was any error on the part of the presiding judge in stating the evidence, it was cured by the manner in which he dealt with the matter. The exception in regard to the question of evidence has not been argued. It plainly related to a matter within the discretion of the presiding judge.

Exceptions sustained.

WILLIAM J. BOTHWELL, administrator, *vs.* BOSTON ELEVATED RAILWAY COMPANY.

Suffolk. January 17, 1913. — September 12, 1913.

Present: RUGG, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Negligence, Due care of frightened person, Street railway, Causing death. *Evidence,* Presumptions and burden of proof, Contradictory statement by witness at preceding hearing. *Practice, Civil,* Ordering judgment under St. 1909, c. 236. *Constitutional Law,* Right to trial by jury. *Jury and Jurors. Supreme Judicial Court. Words,* "Due care."

Where, at a trial in the Superior Court, the defendant offers in evidence, for the sole purpose of contradicting a certain statement made by a witness for the

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plaintiff, a statement to the contrary previously made by the witness when testifying at an inquest, and at the demand of the plaintiff the entire testimony of the witness at the inquest is introduced in evidence, the plaintiff cannot rely on a sentence therein, which does not relate to the subject matter of the testimony in the Superior Court which the defendant is seeking to contradict, to prove affirmatively the facts that were testified to in such sentence.

Evidence tending to show that, while a boy was engaged with others in annoying a Chinaman who was lawfully at work upon his own premises, he became frightened by the conduct of the Chinaman and ran into a street in front of a street railway car by which he was run over and killed, is not evidence of the due care which by St. 1907, c. 392, is made a prerequisite to a recovery against the street railway company for such a death.

In order to recover, in an action under St. 1907, c. 392, against a street railway company for the death of a person, not a passenger, it is necessary for the plaintiff to prove that the decedent was giving reasonably intelligent and energetic attention to his own safety when he was injured, and it is not enough to show a negative and passive freedom from fault on his part.

The provision of St. 1909, c. 236, § 1, that, in a case before this court on an exception by a defendant to a refusal of a presiding judge to order a verdict for such defendant, this court, if the defendant's exception is sustained, may by rescript direct the entry in the trial court of judgment for the defendant, does not violate the right to a trial by jury which is guaranteed by art. 15 of the Declaration of Rights.

TORT under St. 1907, c. 392, for the death of William J. Bothwell, caused by his being run into by a car of the defendant on Washington Street in that part of Boston called Roslindale, and alleged to have been due to negligence of the motorman of the car. Writ dated August 21, 1908.

In the Superior Court the case was tried before *Lawton*, J.

The bill of exceptions stated that at the trial the defendant read a "statement of the plaintiff's witness Dixon given at the inquest in October, 1908, in which the witness Dixon said in substance that he ran up the street, and said nothing about seeing any other car, nor about Willie's [the plaintiff's] stepping back after having once crossed the track. The plaintiff demanded that the whole statement be read and in the course of it the statement said that the other boys were teasing the Chinaman but Willie was not teasing him. The statement was offered by the defendant solely to contradict the witness Dixon in his statement at the trial that he saw another car and that he, Dixon, ran across the street."

Other material facts are stated in the opinion. The jury found for the plaintiff in the sum of $5,000; and the defendant alleged exceptions.

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F. Ranney, (*T. Allen, Jr.*, with him,) for the defendant.

D. H. Coakley, for the plaintiff.

RUGG, C. J. The plaintiff seeks damages for the death of his intestate under St. 1907, c. 392, which authorizes recovery from a street railway company, whose servants in the conduct of its business negligently cause the death of a person, not a passenger or an employee, "in the exercise of due care." The uncontradicted evidence shows that the plaintiff's intestate at the time of the accident was nine years and nine months old. With other boys he was standing on a sidewalk looking at a Chinaman who was fixing something on the floor of a shop with a hatchet. The boys were "teasing" or "mocking" the Chinaman, who, after a few minutes, "got up with the hatchet in the air and walked toward the door." Thereupon the boys, some of them in fright, scattered in different directions, the plaintiff's intestate running into the street in front of a car of the defendant and being fatally injured. The only fair inference from the evidence is that the plaintiff's intestate was engaged with the other boys in vexing the Chinaman. The testimony of one of his companions was that — "McLeod and Miele were with him. They were looking at the Chinaman teasing him. . . . The boys teased the Chinaman," while that of another was, — "We were mocking the Chinaman." There was nothing to impair the force of this testimony The contrary sentence in the statement of one of the plaintiff's witnesses at the inquest, offered solely to contradict his testimony at the trial in the Superior Court in a different respect, was not affirmative evidence of the fact. The point to be decided is, whether a finding was warranted that the plaintiff's intestate was "in the exercise of due care" as required by the statute as a condition of recovery. It is not contended that there is any evidence of active exercise of care by the deceased. But the plaintiff's position is that his intestate was relieved from such exercise of care by reason of the fear into which he was thrown by the conduct of the Chinaman.

Much may be excused in a person under the impulse of fear induced by circumstances over which he has no control and for which he is not responsible. Conduct which unhesitatingly would be pronounced wanting in care in a person under normal conditions may be found prudent in one overwhelmed by fright or confronted with the necessity of instant action in imminent peril. Where

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the fear has been caused by the defendant there is even more reason for judging with leniency the conduct of the person who suffers harm under such circumstances. But in order that this doctrine may be invoked, the injured person himself must be free from blameworthy participation in the event which has caused the fright. Wrongful conduct cannot be treated as an excuse for being in a position of danger. *Black* v. *New York, New Haven, & Hartford Railroad*, 193 Mass. 448, 450. *Rundgren* v. *Boston & Northern Street Railway*, 201 Mass. 156, 158. The plaintiff's intestate was engaged with his companions in the wrongful project of "teasing" and "mocking" a Chinaman at work on his own premises. It might reasonably have been anticipated that in some way he would attempt to be rid of his tormentors. But whatever may be said of his conduct in trying to scare the boys away, or of relative rights between him and the boys, it is nevertheless true that the acts in which the plaintiff's intestate joined were wholly without justification and were wrong. It was not an unnatural result of these acts that he should be momentarily put in fear by the victim of his hectoring.

But whether there could be recovery if the intestate had survived and brought an action in his own name, it is plain that the present action cannot be maintained. If, while thus suffering from fright, fatal injuries are sustained by reason of impact with a street railway car, it cannot be said that the injured person was "actively and actually" in the exercise of the diligence which has been held to be necessary in order that there may be recovery under this statute. It has been settled after elaborate consideration that the words "due care" in this statute mean something more than a negative and passive freedom from fault and require reasonably intelligent and energetic attention to safety, and stand on the same basis as if they were used in an indictment under the same statute. They are not satisfied by "invoking for the test of the defendant's liability under the statute its liability at common law in case of an action for compensation for an injury short of death." *Hudson* v. *Lynn & Boston Railroad*, 185 Mass. 510, 521. It follows that the defendant's request should have been granted to the effect that a verdict be directed in its favor.

It is urged by the defendant that this is a proper case for this court to exercise the power vested in it by St. 1909, c. 236, and

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to direct by its rescript that judgment be entered for the defendant. The case appears to have been fully and fairly tried with an intelligent appreciation by counsel on each side of the issues involved and of the principles of law applicable to it, and its merits on the ample report of the evidence contained in the exceptions seem plain. Therefore it appears to be a case where the statute properly may be invoked. *Archer* v. *Eldredge*, 204 Mass. 323, 327. *Grebenstein* v. *Stone & Webster Engineering Corp.* 205 Mass. 431, 440. *Newhall* v. *Enterprise Mining Co.* 205 Mass. 585. *Burke* v. *Hodge*, 211 Mass. 156, 163.

This course would be followed without discussion but for the decision of *Slocum* v. *New York Life Ins. Co.* 228 U. S. 364, which holds that "the right of trial by jury" secured by art. 7 of the Amendments to the Constitution of the United States does not permit the entry, after a verdict in favor of one party, of a judgment for the opposing party under circumstances like those in the case at bar. The question there arose in reviewing the action of the Circuit Court of Appeals which, under the conformity act (U. S. Rev. Sts. § 914) and following a Pennsylvania statute, had entered judgment in favor of the party for whom the trial court erroneously refused to direct a verdict. The substance of that decision is that it is an unconstitutional exercise of the power of legislation to authorize the entry of judgment in a case where a trial by jury has been had, except in conformity to the verdict, and that, although the error committed by the trial court may consist solely in its refusal to direct a verdict in favor of one party, yet after a verdict wrongly rendered in favor of the adverse party as the direct result of such erroneous refusal, the only method for correcting that error within the reach of the legislative or judicial departments of government is to order a new trial, and this because of the scope of the meaning of "trial by jury," as secured by the Seventh Amendment to the Federal Constitution. That decision is not a final or binding authority on this court, for the reason that the Seventh Amendment does not control the action of the several States in abridging trial by jury within their own jurisdiction. It applies only to the courts and Congress of the United States. *Pearson* v. *Yewdall*, 95 U. S. 294, 296. *Twining* v. *New Jersey*, 211 U. S. 78, 98. The decision of *Slocum* v. *New York Life Ins. Co.* was rendered by a bare majority of a divided

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court, four of the justices, among whom is a former chief justice of this court, joining in a dissenting opinion. But the deference due to a decision by the highest court of the nation when it challenges the constitutionality of our statute (as it does because our own constitution secures the right of trial by jury) renders necessary thorough consideration, even though our statute has been acted upon heretofore in numerous instances without question of its validity.

The substance of our statute is that in civil cases where at the trial a request has been made that on all the evidence a finding or verdict be returned for either party, and such request has been denied and a finding or verdict has been rendered contrary thereto, and it shall be held by this court on exceptions that such request should have been granted, then (if all exceptions by the prevailing party shall be overruled) this court may by rescript direct the entry in the trial court of judgment for the party in whose behalf the request for the finding or verdict was made and erroneously refused. Before the statute of 1909 no such power resided in any of our courts. The practice is stated with clearness in *Smith* v. *Lincoln*, 198 Mass. 388, where it was held that after a verdict the only power of the trial judge was to set aside the verdict. The aim of the act is plain both from its provisions and its title, "To provide for expediting the final determination of causes." However laudable the design for preventing delays in the administration of justice, it can be exercised only in accordance with the limitations imposed by the constitution. Article 15 of the Declaration of Rights of our Constitution provides: "In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherways used and practised, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless, in causes arising on the high seas, and such as relate to mariners' wages, the Legislature shall hereafter find it necessary to alter it." This article has been discussed in numerous cases. It has been held that the Legislature may regulate the mode in which the right shall be exercised and that such regulation does not impair the substance of the right. This rule has been applied to statutes requiring as a condition precedent to the trial an affidavit of defense, *Hunt* v. *Lucas*, 99 Mass. 404; the filing of a claim for

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a trial by jury in order to prevent waiver of the right, *Foster* v. *Morse*, 132 Mass. 354; appeal from decision of tribunal without a jury, *Kenney's case*, 108 Mass. 492; the giving of bail and security for costs on appeal from trial before a magistrate, *Jones* v. *Robbins*, 8 Gray, 329, 341, *Hapgood* v. *Doherty*, 8 Gray, 373; and to statutes changing the rule as to challenges of jurors, *Commonwealth* v. *Dorsey*, 103 Mass. 412; the qualifications of jurors, *Commonwealth* v. *Wong Chung*, 186 Mass. 231, *Commonwealth* v. *Worcester*, 3 Pick. 462, and the weight to be given to evidence, *Holmes* v. *Hunt*, 122 Mass. 505, 516; and restricting the right of the trial judge to set aside a verdict to cases where motion therefor is made and to reasons stated, *Peirson* v. *Boston Elevated Railway*, 191 Mass. 223, 229, *Loveland* v. *Rand*, 200 Mass. 142, *James* v. *Boston Elevated Railway*, 213 Mass. 424. See *Commonwealth* v. *Barry*, 9 Allen, 276.

On the other hand it has been said that trial by jury implies power of the judge to set aside a verdict and grant a new trial, which cannot be impaired by the Legislature. *Opinion of the Justices*, 207 Mass. 606. *Capital Traction Co.* v. *Hof*, 174 U. S. 1.

None of these cases are decisive of the point now presented. It becomes necessary to consider the nature of the trial by jury secured by our Constitution. There was great diversity in the form of jury trial existing in the several States at the time of the adoption of the Constitution of the United States. This is discussed with fecundity of illustration by Hamilton in No. 83 of the Federalist. Plurality of jury trials in Massachusetts in the same case there is referred to. Indeed, this variety of custom between the States has been said to have been the reason why no article securing trial by jury in civil cases was inserted in the Constitution by the convention which framed it. 5 Elliot's Debates, 550.

The trial by jury preserved by our Constitution is the common law trial by jury in its essential characteristics as known and understood at the time the Constitution was adopted. *Commonwealth* v. *Anthes*, 5 Gray, 185, 229. It did not mean to preserve the minor details or unessential formalities of the trial by jury as it then existed either in England or here. That is plain both on reason and authority. Trial by jury in some form had existed since the early settlement of this State. Modifications of the system as practised in the mother country had grown up by custom and by legislation in the Colony and Province of Massachusetts

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Bay. It is not to be thought that the framers of our Constitution in 1780, performing their labors in the midst of the War of the Revolution, had in mind the system of the mother country rather than that with which they were familiar by daily observation. As we understand, the substance of trial by jury in England and in Massachusetts was the same although there were differences of detail. *Parker* v. *Simpson*, 180 Mass. 334, 355. If, however, essential differences existed, it seems to us not open to debate that the trial by jury known and practised in this State at the time the Constitution was framed and adopted was the one meant by art. 15 of our Declaration of Rights. It was pointed out with ample reference to the statutes by Mr. Justice Story in *United States* v. *Wonson*, 1 Gall. 5, that both in the colonial and provincial periods of the history of our Commonwealth two trials by jury upon the same issues in the same case often were permissible as of right, one in the court of first instance and one in the appellate court. This continued to be the law until after the ratification of the Federal Constitution. St. 1782, c. 11, §§ 2, 5; c. 14, § 3. St. 1784, c. 28, § 8. It has never been suggested, so far as we are aware, that this double jury trial was one of the incidents of the constitutional right of our citizens. Under our practice trial by jury in its constitutional sense does not include all the features which attach to the right in England. This is pointed out in *Simmons* v. *Fish*, 210 Mass. 563, 569, where one difference touching the scope of a new trial is discussed. Our cases there are reviewed at length and it is shown that a new trial in this State (contrary to the established law of England) has been construed not to require a new trial of all the issues raised by the pleadings when in law and in the exercise of sound sense it appears that the issue as to which alone error was committed in the trial is wholly separable from those as to which a full and fair trial in law was had and may with entire justice and a jealous regard to the rights of all parties, both in their strictly legal aspects and in the practical phases likely to arise in a jury trial, be submitted as a separate and distinct matter to be determined by a new jury. This power is exercised with caution. But its existence does not impair in any of its essential features the right of trial by jury which the Constitution commands to be held sacred. See *Randall* v. *Peerless Motor Car Co.* 212 Mass. 352, 392; 25 Ann. Cas. 588, and cases collected.

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It was a part of common law trial by jury that the plaintiff might become nonsuited as of right at any time before verdict if not before judgment. *Derick* v. *Taylor*, 171 Mass. 444, and cases there collected. 2 Tidd's Pract. 867. *Haskell* v. *Whitney*, 12 Mass. 47, and cases cited in note at p. 49. But as early as 1820 it was decided that in this Commonwealth apparently as a practice long existing a plaintiff had no such right after the case was opened to the jury. *Locke* v. *Wood*, 16 Mass. 317. See *Carpenter & Sons Co.* v. *New York, New Haven, & Hartford Railroad*, 184 Mass. 98. It is pointed out both in the opinion and in the dissent in *Slocum* v. *New York Life Ins. Co.* 228 U. S. 364, that there is no novelty in a judgment being given at common law without a verdict by a jury for that was accomplished by a demurrer to evidence. *Copeland* v. *New England Ins. Co.* 22 Pick. 135. It is stated that our statutes make simpler provision for reaching the result available by that common law method. *Golden* v. *Knowles*, 120 Mass. 336. There are other similar instances. It is laid down in 2 Tidd's Pract. 900 (a work of undoubted authority as to common law) as a principle of jury practice at common law that "It sometimes happens that a point is reserved, or saved by the judge at *nisi prius*, with liberty to apply to the court for a nonsuit or verdict; in which case, the court has been in the habit of considering itself in the situation of the judge, at the time of the objection raised; and a nonsuit or verdict is entered according to their determination, without subjecting the parties to the delay and expense of a new trial." Numerous cases there are cited where such practice has been adopted, the following being the most pertinent: *Cox* v. *Kitchin*, 1 B. & P. 338; *Attwood* v. *Small*, 1 Man. & Ry. 246, 261 (a); *Mead* v. *Robinson*, Barnes's Notes, 451; *Kemp* v. *The Hundred of Strafford*, Barnes's Notes, 455. Judgment appears not infrequently to have been entered by order of the appellate court upon special case stated. See for example *Wright* v. *Cartwright*, 1 Burr. 282; *Atkin* v. *Barwick*, 1 Strange, 165; *Coppendale* v. *Bridgen*, 2 Burr. 814. This practice seems to have been followed in New York in some instances, *Holmes* v. *D'Camp*, 1 Johns. 34; *Hatten* v. *Speyer*, 1 Johns. 37; and perhaps rested in many instances on consent. 2 Tidd's Pract. 898. This is akin to our practice on a case stated. *Massachusetts National Bank* v. *Bullock*, 120 Mass. 86.

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A somewhat analogous practice is described at length in *Treacher* v. *Hinton*, 4 B. & Ald. 413, 416, 417, in the compulsory nonsuit by the judge, giving the plaintiff liberty to move for a verdict in his favor, which, if subsequently ruled to have been required by law, then might be entered to be as effective as if pronounced by the jury. This case, decided in 1821, states apparently a well understood and ancient common law practice, no doubt in existence at the time of the adoption of our Constitution. Illustrations of this practice are to be found in *Hobbs* v. *London & Southwestern Railway*, L. R. 10 Q. B. 111, 113, 125; *Reed* v. *Kilburn Cooperative Society*, L. R. 10 Q. B. 264. See 26 Harv. Law Rev. 732. It has not been commonly supposed that in England any impairment of the vitals of trial by jury has been wrought by modern statutes. See 8 Am. Law Rev. 256, 274. Yet a practice similar to that prescribed by our statute exists there. *McGuire* v. *Western Morning News Co.* [1903] 2 K. B. 100, 113.

In view of all these considerations we are of opinion that St. 1909, c. 236, is not a violation of the right to a trial by jury secured by our Constitution. The falling into disuse of the two trials, which existed in many instances as of right in this Commonwealth at the adoption of the Constitution, within half a century thereafter, is evidence to this conclusion. This is confirmed by the early denial to the plaintiff of the right to become nonsuited after the evidence was in. It is supported by the common law practice to which reference has been made.

The essence of trial by jury is that controverted facts shall be decided by a jury. The constitutional right to trial by jury is preserved in this regard when each party has one fair opportunity to present to a jury the evidence on which he claims to raise an issue of fact. If he fails utterly to improve that opportunity, there is no constitutional guaranty that he shall be given another chance. He has had his day in court. One feature of ideal administration of justice by the jury system is that correct rulings of law shall be made by the presiding judge. If the record is so framed and preserved that the same result may be reached at a later time as would have been attained by such correct rulings at the trial that end is attained by constitutional means. The function of the jury is to pass upon the facts involved in an action. The statute now under review does not infringe upon this

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province in any degree. A trial judge always has had power to direct a verdict provided the law required it. The statute simply permits that to be done by this court which ought to have been done at the trial. The hypothesis by which alone it permits the order to be made is that at the trial no question of fact was in truth presented, but only one of law which the court should have ruled as such. It does not disturb the plain boundary between fact which a jury must determine and law which the court must rule. It permits the right ruling to be given at a time later than that at which it should have been made when no substantial rights have accrued in the meantime.

We are of opinion that the history of our practice as to trial by jury both before and since the adoption of the Constitution shows that the trial by jury of our Constitution has slightly more flexibility in its adaptation of details to the changing needs of society without in any degree impairing its essential character than is ruled by the majority of the court in *Slocum* v. *New York Life Ins. Co.* We are constrained not to adopt the reasoning or the conclusion of that opinion as correctly defining the scope of legislative power under our Constitution. St. 1909, c. 236, is not in violation of our Constitution. This result is in harmony with the decisions of many other courts.* We do not rest this judgment upon their authority, however, for we have not undertaken the historical study of the several constitutional provisions under which they have arisen to determine their weight.

The defendant's exceptions are sustained, and in accordance with St. 1909, c. 236, judgment is to be entered in the Superior Court for the defendant and rescript is to go to that effect.

So ordered.

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* *Anderson* v. *Fred Johnson Co.* 116 Minn. 56. *Muench* v. *Heinemann,* 119 Wis. 441, 448. *Hay* v. *Baraboo,* 127 Wis. 1. *Cornette* v. *Baltimore & Ohio Railroad,* 115 C. C. A. 61. *Bailey* v. *Willoughby,* 33 Okla. 194. *McVeety* v. *Harvey Mercantile Co.* 139 N. W. Rep. 586. *Fishburne* v. *Robinson,* 49 Wash. 271. *Roe* v. *Standard Furniture Co.* 41 Wash. 546. *Cruikshank* v. *St. Paul Fire & Marine Ins. Co.* 75 Minn. 266. *Dalmas* v. *Kemble,* 215 Penn. St. 410. *American Car & Foundry Co.* v. *Alexandria Water Co.* 221 Penn. St. 529. *Manning* v. *Orleans,* 42 Neb. 712. *Smith* v. *Jones,* 104 C. C. A. 329. *Fries-Breslin Co.* v. *Bergen,* 99 C. C. A. 384. *Carstairs* v. *American Bonding & Trust Co.* 54 C. C. A. 85. *Richmire* v. *Andrews & Gale Elevator Co.* 11 No. Dak. 453.

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MENDELL W. CRANE, trustee, *vs.* STILLMAN C. WHITE.

Middlesex. January 20, 1913. — September 12, 1913.

Present: RUGG, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Mortgage, Real estate: foreclosure. *Sale*. *Equity Jurisdiction*, For an accounting.

Where the published advertisement of a sale in foreclosure of a mortgage of real estate states that the terms and conditions of the sale will be announced at the time and place of the sale, and, at the sale and before the bidding, the auctioneer announces that the property will be "sold subject to interest," and the sale is conducted fairly and a price is obtained which is the reasonable value of the property under all the circumstances, the purchaser must be taken to have bought the property with an agreement on his part to pay the interest then due on the mortgage, so that the mortgagee, in accounting with the mortgagor or his successor in title for the proceeds of the sale, is not entitled to be credited with the amount due as interest on the mortgage at the time of the sale, although the mortgage states that out of the sum received at the sale the mortgagee may retain all sums then secured by the mortgage, "whether then or thereafter payable."

BILL IN EQUITY, filed in the Superior Court on August 12, 1909, by the trustee in bankruptcy of Henry A. LeBow, seeking an accounting by the defendant for sums received by him as mortgagee from the sale in foreclosure of two mortgages on separate parcels of land on Homestead Street in that part of Boston called Roxbury.

The case was referred to Frank M. Forbush, Esquire, as master.

The master refused to allow the defendant credit for certain sums due as interest on the mortgage notes at the time of the foreclosure sales. It appeared that each mortgage contained the usual provision that, out of money arising from a foreclosure sale, the mortgagee might retain all sums then secured by the mortgage, "whether then or thereafter payable, including all costs, charges and expenses incurred or sustained by them by reason of any default in the performance or observance of the" conditions of the mortgage. The published advertisement of each sale contained the statement, "Terms and conditions of sale announced at time and place of sale." At each sale the auctioneer announced that the property was "sold subject to interest, taxes and a dis-

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puted claim for personal property" then on the premises. The item of interest, with other items, was on a piece of paper which the auctioneer handed to the person who, after receiving the paper, made the highest bid and purchased the property. The amount bid in each case included the principal amount of the mortgage, the interest alleged to be due, the cost of advertising and amounts stated on the auctioneer's paper to be fees for the auctioneer and the attorney for the mortgagee, which items made up the entire amount bid by the purchaser. The master found that the items for auctioneer's and attorney's services were somewhat too large, so that the price for which the property was sold slightly exceeded the aggregate of the face of the mortgages with expenses and interest as found by the master.

The case was heard on the master's report by *Richardson*, J., who ordered a final decree directing the defendant to pay to the plaintiff, among other sums, a sum equal to the amount of interest due on the mortgages at the time of the sale. From a decree so entered, the defendant appealed.

C. W. Cushing & D. Powers, for the defendant, submitted a brief.

J. H. Blanchard, for the plaintiff.

RUGG, C. J. The plaintiff is the trustee in bankruptcy of the owner of the equity of redemption in two parcels of real estate upon which the defendant held mortgages, and which he foreclosed. One of the terms of each foreclosure sale was stated to be that the property would be sold subject among other claims to the unpaid interest, the amount of which was announced. The property was purchased by the defendant, whose bid slightly exceeded the aggregate of the face of the mortgage and expenses and interest. The question is whether in this suit for an accounting the defendant is entitled to retain the unpaid interest out of the proceeds of the sale, or whether the plaintiff is entitled to the excess above the face of the mortgage and the expenses of foreclosure.

It must be assumed in the absence of any finding to the contrary that the foreclosure sale was conducted fairly and that the price bid was the reasonable value of the property under all the conditions. The announcement that the purchaser must take the property subject to a stated amount of unpaid interest must be presumed to have produced its natural effect upon prospective

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bidders and the price at which finally it was struck off may be assumed to have been the fair price. Taken according to its terms that price meant that the purchaser was willing to give it and in addition pay the interest up to the amount stated, as well as the taxes and the other claims announced at the sale. The defendant having become the purchaser and being bound to exercise the utmost good faith in making the foreclosure sale, cannot with justice be heard to say that the terms of the sale did not mean what they were announced to be. It cannot be presumed in his favor under these circumstances that others present would not have been bidders upon a literal interpretation of the publicly stated terms of sale, and that therefore he ought not to be held to them. The fair implication from all the facts is that he has become the owner of real estate fairly worth the sum stated as the interest, subject to which the sale was made, more than the face of the mortgage and expenses.

Decree affirmed with costs.

WILLIAM S. GOULD'S CASE.

Suffolk. March 14, 1913. — September 12, 1913.

Present: RUGG, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON, & DE COURCY, JJ.

Workmen's Compensation Act, Procedure, Not extraterritorial. *Practice, Civil*, Appeal, Exceptions. *Words*, "Suit," "Judgment," "Action."

Under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, which provides that any party in interest in a proceeding before the Industrial Accident Board, created by the workmen's compensation act, "may present certified copies of an order or decision of the board . . . and all papers in connection therewith, to the Superior Court . . . whereupon said court shall render a decree in accordance therewith . . . [which] . . . shall have the same effect . . . as though rendered in a suit duly heard and determined by said court, except that there shall be no appeal therefrom upon questions of fact," it is not improper that with such certified copies a petition should be filed setting forth the nature of the questions to be decided.

A proceeding under the workmen's compensation act brought before the Superior Court under the provisions of St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, is to be treated, in the main, as equitable rather than legal in its nature.

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The remedy of a party aggrieved by a decree of the Superior Court in a proceeding brought before it under the provisions of the workmen's compensation act contained in St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, is by an appeal to this court and not by a bill of exceptions.

The workmen's compensation act, contained in St. 1911, c. 751, St. 1912, cc. 571, 666, provides no compensation for injuries received outside this Commonwealth.

RUGG, C. J. This is a proceeding under the workmen's compensation act, St. 1911, c. 751, and St. 1912, cc. 571 and 666.

1. At the threshold lies a question of practice. The insurer, being a party in interest, presented its petition to the Superior Court, together with certified copies of the decision of the Industrial Accident Board. The petition alleges the interest of the employee, employer and insurer, the date of the decision and the insurer's desire to have determined questions of law set out in the decision. St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, provides that "any party in interest may present certified copies of an order or decision of the board . . . and all papers in connection therewith, to the Superior Court . . . whereupon said court shall render a decree in accordance therewith and notify the parties. Such decree shall have the same effect and all proceedings in relation thereto shall thereafter be the same as though rendered in a suit duly heard and determined by said court, except that there shall be no appeal therefrom upon questions of fact." While this section does not require anything more than the bare presentation of the copies of the designated proceedings of the Industrial Accident Board, it is not improper that a petition be filed setting forth briefly the nature of the questions to be decided.

When the case came on to be heard in the Superior Court a decree was entered in accordance with the decision of the board. The judge* also allowed a bill of exceptions, stating that it was for the purpose of enabling this court to determine the proper manner of bringing before it proceedings of this sort.

The workmen's compensation act has a procedure all of its own. Where the act is adopted by the parties, a relation arises between the employee and the employer, under which in the event of a personal injury to the employee there shall be speedy ascertainment

* *Pierce, J.*

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of the new kind of compensation created by the act, coupled with a voluntary relinquishment by both parties of the right to trial by jury as to matters covered by the act. One main purpose of the act is to establish between employee and employer, in place of the common law or statutory remedy for personal injury, which is based upon tort, a system whereby compensation for all personal injuries or death of the employee received in the course of and arising out of his employment, whether through unavoidable accident or negligence or otherwise, (except through his serious and wilful misconduct,) shall be determined forthwith by a public board, and paid by the insurer. For the accomplishment of these ends a simple method is furnished operating without delay or unnecessary formality. The practice should be direct and flexible in order to adapt the remedy to the needs of the particular case. In one aspect a case under the act resembles an action at law, for it seeks ultimately the payment of money. Payments, however, in most instances are by instalments. In another aspect it is akin to the enforcement of the specific performance of a contract, designed to cover the whole range of misfortunes likely to arise in the course of employment in a State with many and diversified industries. Moreover, the compensation is to be paid not directly by the employer, but by the insurer, who is either the "Massachusetts Employees Insurance Association" created by Part IV of the act or any liability insurance company authorized to do business within the Commonwealth. The employee has no immediate relation with the insurer. He is the beneficiary under a contract between the employer and the insurer. A beneficiary under any instrument to which he is not a direct party more naturally looks to equity rather than to law for relief. Part III, § 11, as amended by St. 1912, c. 571, § 14, requires a "decree" to be entered, and refers to the proceeding as a "suit." A decree in our practice commonly refers to that which is entered in equity. "Judgment" is the word expressive of the end of an action at law. "Suit," while a word of comprehensive signification, is applied usually in our practice to proceedings in equity, while "action" is the word descriptive of proceedings at law. Our statutes in general, although perhaps not with absolute uniformity, refer to proceedings in equity as suits, see R. L. c. 159, and to those at law as actions, see R. L. c. 167. Giving due weight to the phraseology of equity procedure

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employed in this section, to the beneficent purposes of the act, which can be enforced better through the relief afforded by equity, and to the character of the proceeding itself and the parties thereto, it follows that, in the main, causes under the act in court should be treated as equitable rather than legal in nature, procedure and final disposition.

The act provides only for an appeal, and makes no reference to exceptions. Although exceptions to rulings and refusals to rule are permitted in our system of equity, that is a statutory engraftment, not according to general chancery procedure, and an appeal is simpler and on all grounds better practice. But where exceptions are taken, there can be no final decree until the exceptions are disposed of. The present act, however, requires a decree, which in the ordinary case must be final in its nature, to be entered by the Superior Court. This precludes the possibility of exceptions. It follows that the suit must be brought here by appeal from the decree of the Superior Court, and not by exceptions. As exceptions could not be allowed legally, the case is here rightly on appeal.

2. The facts are that the employee, a citizen and resident of this Commonwealth, made a contract here with the employer, a Massachusetts corporation, for rendering to it his personal services, and accepted the benefits of the act. In the course of his employment he received the injury out of which this claim arises, in the State of New York. He was principally employed in Massachusetts, but at times incidentally worked in New York and other States. The Industrial Accident Board found that the insurer had been paid by the employer for insuring all injuries received by its employees in the course of their employment, whether within or without the Commonwealth. This factor is not of much significance because the obligation of the policy does not refer to anything occurring outside the State, and provides only for performance of the requirements and payment of the compensation designated in the act. If the act prescribes the payment of compensation for injuries received outside the State the insurer has contracted therefor, otherwise it has not.

The question is whether the act governs the rights of parties touching injuries received outside the State. It may be assumed for the purposes of this judgment that it is within the power of the

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Legislature to give to the act that effect as claimed for it by the employee. *Mulhall* v. *Fallon*, 176 Mass. 266.

The point to be decided is whether the language used in the act indicates a purpose to make its terms applicable to injuries received outside the State. This must be determined by a critical examination of the words of the statute in the light of its humane purpose. There is nothing which expressly states that the act governs the rights of the parties touching such injuries. This is significant. In the absence of unequivocal language to the contrary, it is not to be presumed that statutes respecting this matter are designed to control conduct or fix the rights of parties beyond the territorial limits of the State. *Boston & Maine Railroad* v. *Trafton*, 151 Mass. 229. *Howarth* v. *Lombard*, 175 Mass. 570, 572. *Young* v. *Boston & Maine Railroad*, 168 Mass. 219. *Stone* v. *Old Colony Street Railway*, 212 Mass. 459, 464. *Merrill* v. *Boston & Lowell Railroad*, 63 N. H. 259, 260. *Ewen* v. *Thompson-Starrett Co.* 208 N. Y. 245. Part I of the act, which is entitled "Modification of Remedies," and which abolishes certain common law rights of action and defenses for "subscribers" and their employees who do not claim such rights in writing, can relate only to injuries received within the Commonwealth. The correlative provisions which follow and which are substitutional in their nature for the common law remedies and defenses, naturally would be expected to cover the same field in the absence of clear words indicating a larger scope.

A consideration of the act in detail fails to disclose any plain intent to that end. On the contrary, several provisions indicate solely intrastate operation. Part II, § 19, provides that the employee who has received an injury shall submit himself on request to an examination "by a physician or surgeon authorized to practise medicine under the laws of the Commonwealth." It hardly can be inferred from this language that the Legislature intended that physicians or surgeons from Massachusetts should journey to the place of injury, or that those authorized to practise under the laws of other States should make the examination. Part III of the act, which relates to procedure, and which as has been pointed out creates a wholly new method of procedure, deals only with boards and courts within this Commonwealth. No provision is made for enforcing rights as to injuries occurring outside the State.

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Part III, § 7, as amended by St. 1912, c. 571, § 12, requires that the hearings of the committee on arbitration "be held in the city or town where the injury occurred." Obviously, this cannot relate to injuries received outside this Commonwealth. Section 11 as amended by St. 1912, c. 571, § 14, provides that in the event of resort to the courts copies of the papers shall be presented "to the Superior Court for the county in which the injury occurred or for the county of Suffolk." The words "for the county of Suffolk" may be presumed to be inserted for convenience, as the offices of the Industrial Accident Board are in Suffolk and courts are continually in session in that county, and not in order to make provision for injuries occurring outside the State. Part III, § 18, requires the employer, within forty-eight hours, not counting Sundays and legal holidays, after the accident resulting in personal injury, to make a report "in writing to the Industrial Accident Board." Part IV, § 18, authorizes the directors of the Massachusetts Employees' Insurance Association, created by the act, to make and enforce reasonable rules and regulations for the prevention of injuries on the premises of the subscribers, "and for this purpose the inspectors of the association shall have free access to all such premises during regular working hours." This section is in furtherance of that part of the purpose of the act as set forth in its title for the prevention of industrial injuries. But it cannot be operative outside of Massachusetts.

Moreover, our act discloses no purpose to exempt from its operation non-resident employees of alien employers who while working within this Commonwealth may receive personal injuries arising out of and in the course of employment. If our act is to be interpreted as having extraterritorial force, similar effect must be accorded to like laws of other States. There would be difficulty in reading such an exception into the phrase of our statute. By Part II, § 20 of the act agreements by employees to waive the provisions of the act are made invalid. This section does not easily permit the inference that contracts under the statutes of other States to abide exclusively by the terms of such statutes were thought of and intended to be excepted by the Legislature. The definitions of our act evidently were not framed with the end of covering the matter now under discussion. "Employee" is defined as including "every person in the service of another under any

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contract of hire," with certain exceptions. Part V, § 2, cl. 3. See St. 1913, c. 448. The natural significance of this is that it includes a service being performed in this Commonwealth. Section 21, to the effect that no payment under the act shall be liable in any way for debts of the employee, does not readily lend itself to the idea that the Legislature intended the act to have extraterritorial force. Great difficulties might arise in establishing such an exemption elsewhere.

These provisions collectively disclose a purpose to confine the operation of the act to the territory of this Commonwealth. They fall far short of manifesting a plain legislative intent to control the relations of parties as to injuries received outside of Massachusetts.

This conclusion is confirmed by other considerations which point to the improbability that the Legislature would have expressed such an intention (if it existed) in any but the plainest words.

It is apparent, from a comparison of the two acts, that our own follows in important particulars the provisions of the English act. That act (although it has been held generally to be inoperative outside the United Kingdom) in express terms applies to masters, seamen apprentices in the sea service under certain conditions, and definitely points out the manner of proving and enforcing claims for injuries occurring therein with reference plainly to those outside the United Kingdom. See St. 6 Edw. VII. c. 58, § 7. If it had been the intention of the Legislature to include such injuries within the purview of the act, definite language in the English act to this end hardly would have been overlooked. Workmen's compensation acts had been enacted in many foreign countries before 1911, and the texts of these had been printed in a report of the United States Commissioner of Labor and (as shown by the report of the Massachusetts Commission of Compensation for Industrial Accidents) were known to the framers of our act. Several of these foreign acts made definite and careful provision respecting accidents outside their territory.* It is a violent

* 24 Annual Report of U. S. Com. of Labor, vol. 2 [1909]; France: Acts of 1898, 1902, 1905, 1906, p. 2501; Austria: Law of 1894, art. 2, pp. 2456, 2457; Belgium: Act of 1903, art. 26, p. 2464; Germany: Law of 1900 (a), art. 4, p. 2517; (see also German Ins. Code of 1911, art. 157, translated in Boyd on Workmen's Compensation, p. 1252;) Hungary: Act No. XIX of

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assumption, under these circumstances, that the Legislature intended its similar law to apply to injuries received in foreign jurisdictions without express words to that effect.

The subject of personal injuries received by a workman in the course of his employment is within the control of the sovereign power where the injury occurs. "It must certainly be the right of each State to determine by its laws under what circumstances an injury to the person will afford a cause of action." *Davis* v. *New York & New England Railroad*, 143 Mass. 301. See *Cormo* v. *Boston Bridge Works*, 205 Mass. 366. Most of the compensation acts of the States of the Union contain no provision respecting injuries received in a foreign jurisdiction, although several exempt persons engaged in interstate commerce where federal laws shall be construed to furnish exclusive remedies (Laws of Illinois, 1911, pp. 314–326, St. of Kansas, 1911, c. 218, § 7, Pub. Acts of Michigan, 1912, No. 10, Part VI, § 4, Laws of Washington, 1911, c. 74, § 18), while some expressly limit the operation to employment within the State. St. of Nevada, 1911, c. 183, § 3. Laws of Washington, 1911, c. 74, § 2. Laws of Wisconsin, 1911, c. 50, § 1.

Workmen's compensation acts have been discussed generally throughout this country. It is said in the report of the Commission on Compensation for Industrial Accidents, (pages 77, 93,) made in accordance with Resolves of 1911, cc. 66, 110, that in thirteen States besides Massachusetts laws of this general character have been enacted, while in eleven others commissions have been appointed to investigate the subject and to draft laws. These various acts, although having certain features in common, nevertheless differ widely in many essential aspects. Some are compulsory. Some prohibit contracts for a different form of compensation, and make criminal under severe penalties failure to comply with their terms. Some provide for strict State insurance, while others do not. The amount of compensation afforded and the circumstances under which it is to be awarded differ. The diversity of public policy already manifested among the several States is considerable. To say that such acts are intended to operate on

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1907, art. 4, 5 & 6, p. 2569; Italy: Law of 1904, art. 21 & 25, p. 2617; Luxemburg: Law of 1902, art. 3, pp. 2621, 2622; Netherlands: Law of 1901, art. 9, p. 2641; New Zealand: Act of 1908 (a), § 11, p. 2664; Queensland: Act of 1905 (a), § 2, p. 2687; Transvaal: Act of 1907, § 1, p. 2720.

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injuries received outside the several States enacting them would give rise to many difficult questions of conflict of laws. See *Slater* v. *Mexican National Railroad,* 194 U. S. 120. It would require a large dependence upon the comity of other States in enforcing our act and in refraining from enforcing their own as to a subject which commonly is wholly under the control of the several States, and with which, it has been pointed out, a substantial number have already manifested a purpose to deal by a new and special legislation. No court of any sister State, so far as we are aware, has had occasion to pass upon the precise questions here presented.

If employees and employers from different States carry their domiciliary personal injury law with them into other jurisdictions, confusion would ensue in the administration of the law, and at least the appearance of inequality among those working under similar conditions. If such a result had been intended by the General Court, it cannot be doubted that it would have been disclosed in unambiguous words. The trend of the development of the law, historically considered, has been away from a personal law, and toward a territorial law, before which all are equal. See General Survey of Continental Legal History, pp. 80–83. A reversion to such an ancient theory is not lightly to be inferred. It is of the essence of law, where the common law prevails, that it should be common to all similarly situated.

All these considerations combined forbid the inference that the Legislature, having failed to use plain and unmistakable words to that end, intended our act to govern the rights of the parties as to an injury received in another jurisdiction.

It has been held that the English workmen's compensation act has no extraterritorial effect, save as to certain classes in shipping service; *Tomalin* v. *S. Pearson & Son,* [1909] 2 K. B. 61; *Schwartz* v. *India Rubber, Gutta Percha & Telegraph Works Co.* [1912] 2 K. B. 299; *Hicks* v. *Maxton,* 124 L. T. Rep. 135; while the contrary has been held respecting the German act. *Schweitzer* v. *Hamburg American Co.* 138 N. Y. Supp. 944. The character of these acts and decisions affords no light upon the present inquiry.

This proceeding has not been brought to this court without reasonable ground, and no cost is assessed under Part III, § 14.

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A decree should be entered to the effect that the employee has no claim against the insurer.

The exceptions must be dismissed.

So ordered.

The case was argued at the bar in March, 1913, before *Rugg*, C. J., *Hammond*, *Loring*, *Sheldon*, & *De Courcy*, JJ., and afterwards was submitted on briefs to all the justices.

E. C. Stone, (*G. F. Grimes* with him,) for the insurer.

G. P. Drury, for the employee.

NATIONAL SECURITY BANK OF BOSTON *vs.* CHARLES R. BATT, executor, & another.

Suffolk. March 18, 1913. — September 12, 1913.

Present: RUGG, C. J., MORTON, LORING, SHELDON, & DE COURCY, JJ.

Equity Jurisdiction, Interpleader. *Equity Pleading and Practice*, Bill.

In a bill of interpleader brought by a national bank against the widow of a deceased depositor of the plaintiff and the executor of the will of such deceased depositor, who also was the president of the plaintiff, it was alleged that the deceased depositor on the day before his death drew a check on the plaintiff for $10,000 payable to his wife and delivered it to her, having then a balance greater than that amount to his credit, that the day after his death his widow presented this check to the plaintiff and payment was refused, that before this presentation of the check the plaintiff had paid another check drawn by the depositor which reduced the balance to the credit of the estate of the depositor somewhat below $10,000, that later the executor deposited funds which made the balance of the testator's account somewhat greater than $10,000 and thereupon transferred to the credit of the testator's widow in the plaintiff bank the sum of $10,000, that thereafter the executor, being apprehensive that he had acted without authority in doing this, caused the transaction to be reversed by having the account of the widow charged with the sum of $10,000 and his account as executor credited with a like amount, whereupon the widow drew her check on the plaintiff for $10,000, and, on payment being refused, brought an action at law against the plaintiff for that amount. Upon demurrer, it was *held*, that the bank could not maintain the bill to compel the widow and the executor to interplead for the purpose of determining the validity of their respective claims to the fund in the hands of the plaintiff, because the plaintiff might have made itself liable to the widow by crediting the sum of $10,000 to her account so as not to be in the position of a disinterested stakeholder.

In a bill in equity to have two defendants ordered to interplead so that their respective rights to a fund in the hands of the plaintiff may be determined, if the specific allegations of the bill disclose a ground on which the plaintiff

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may be held liable to one of the defendants, which cannot be passed upon in a suit of interpleader, the bill cannot be maintained, although it contains a general allegation that the plaintiff holds the fund for the true owner and has incurred no independent liability to either of the defendants.

MORTON, J. This is a bill in equity in which the plaintiff seeks to interplead the two defendants in respect to a fund of $10,000 alleged to be held on deposit by it. There was a demurrer by the defendant Mary Rennison which was sustained and a decree was entered * dismissing the bill with costs. The plaintiff and the other defendant appealed.

We think that the decree sustaining the demurrer and dismissing the bill was right and should be affirmed. From the facts alleged in the bill it appears that John Rennison the husband of the defendant Mary Rennison died testate on the ninth day of July, 1911, and that on August 17 his will was duly admitted to probate and letters testamentary were issued to the defendant Charles R. Batt, the executor named therein. On the eighth day of July, the day before he died, John Rennison drew on the plaintiff bank, where there was then on deposit to his credit the sum of $10,354.12, a check for $10,000 in favor of Mary Rennison, and delivered the same to her. This check was presented by Mary Rennison on Monday, July 10, to the defendant Batt, who was the president of the bank, and to the cashier, and payment thereof was demanded by her, which was refused by Batt on the ground that he did not then know whether the bank could rightfully pay it. Previous to the presentation of the check by Mary Rennison and before the bank knew of that check, the bank had paid a check for life insurance for $444.10, drawn by John Rennison, so that at the time of the presentation of the check for $10,000 by Mary Rennison the amount on deposit to the credit of John Rennison was $9,910.02. The amount to the credit of John Rennison's estate continued to be less than $10,000 until July 13, when Batt, in anticipation of the receipt of rents due to John Rennison before his death and which were to be paid and were in fact paid before August 1, caused the sum of $108.33 to be deposited to the credit of John Rennison's estate, which with the amount then standing to the credit of the estate made the total amount to the

* In the Superior Court by order of *Morton*, J.

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credit of the estate $10,022.48, and Batt thereupon caused the sum of $10,000 to be transferred from said sum of $10,022.48 to the credit of Mary Rennison in said bank. There is an allegation in the bill that neither on July 10, when the check was presented by Mary Rennison, nor on July 13, when the transfer aforesaid was made, were there sufficient moneys on deposit with which to pay said check. This allegation is inconsistent, so far as relates to the amount on deposit on July 13 at the time when the transfer was made, with previous allegations, and we assume that it is in this respect erroneous. Subsequently, on September 27, Batt, having been advised that Mary Rennison was not entitled to said sum of $10,000 and that it belonged to the estate of John Rennison and had been wrongfully credited to the account of Mary Rennison, or that at any rate the question was so doubtful that for his protection as executor and for the protection of those interested under the will the money should be placed to the credit of the executor or otherwise secured till the question should be determined by the court, caused the $10,000 to be charged against the account of Mary Rennison and credited to his account as executor in order to preserve the rights of all parties. On the third of October, 1912, Mary Rennison, asserting that said fund of $10,000 was rightfully to her credit and should be so considered, and that she was entitled to draw her check on the bank for that sum, drew her check on the bank for that amount and demanded payment thereof, which the bank refused to pay on the ground that it had no funds to her credit and that she had largely overdrawn her account. Thereupon Mary Rennison, by writ dated October 4, 1912, and returnable to and with the declaration entered in the Superior Court on the first Monday of November, 1912, brought an action at law which is now pending in that court against the bank for the recovery of $10,000, alleging that on said October 3, at the time of the presentment of the check drawn by her and of demand of payment, she had that amount to her credit in the bank, whereas, as the bill avers, she well knew that such amount or any amount would not have been there to her credit unless said fund of $10,000 was to be considered as then held in deposit by the bank on her account, and that even with that there were not sufficient funds to her credit to pay the check of October 3, and that said action was in fact brought to recover said fund on the theory that

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it legally and equitably belonged to her and should be considered as standing to her credit in the bank. The bill avers further that the plaintiff holds said fund for the true owner and has no claim to or interest in said sum and has incurred no independent liability to either of the defendants other than that created by the possession of said fund. The bill prays, amongst other things, that the defendant Mary Rennison may be enjoined from prosecuting the action at law commenced as aforesaid, and that the defendants may interplead respecting their claims to said sum of $10,000.

It is manifest, we think, from this recital, that the defendant Mary Rennison may have a claim against the plaintiff growing out of the transactions between it and her because of the transfer by it of $10,000 from the account of John Rennison to her account, which is independent of the question whether she or the executor would be or is entitled to the fund of $10,000 represented by the check given to her by her husband. In other words it may turn out, according to the allegations of the bill, that, if she has any right or title to the $10,000 for which she has brought suit, she has derived it from the plaintiff and not from her husband, although the check which she received from her husband was what led to the transactions between her and the plaintiff on which she relies. In such a case it is plain that a bill cannot be maintained by the bank to compel her and the executor to interplead. As was said in *Fairbanks* v. *Belknap*, 135 Mass. 179, 184, "The office of such a suit is to protect a party, not against a double liability, but against a double vexation on account of one liability." See *Third National Bank* v. *Skillings Lumber Co.* 132 Mass. 410; *National Life Ins. Co.* v. *Pingrey*, 141 Mass. 411; *Weatherbee* v. *New York Life Ins. Co.* 182 Mass. 342; *Welch* v. *Boston*, 208 Mass. 326. By its allegation that it holds the fund for the true owner and has incurred no independent liability to either of the defendants, the plaintiff cannot avoid the effect of other allegations relating to the transfer by it of the sum of $10,000 from the account of the estate of John Rennison to the account of the defendant Mary Rennison. Whether, as the defendant Batt argues, no contractual relation between the defendant Rennison and the plaintiff was created by the putting of the $10,000 to her credit by the bank, and whether she acquired thereby any independent cause of action, cannot be

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determined in this proceeding. Neither can the question of the validity of the check given to her by her husband be settled in this proceeding.

It follows that the decree dismissing the bill with costs was right.

Decree affirmed with costs of the appeal.

W. F. Prime, for the plaintiff.

S. Z. Bowman, for the defendant Charles R. Batt, executor.

S. L. Whipple & A. Lincoln, for the defendant Mary Rennison, were not called upon.

BOSTON RAILROAD HOLDING COMPANY *vs.* COMMONWEALTH.

Suffolk. March 20, 1913. — September 12, 1913.

Present: RUGG, C. J., MORTON, LORING, SHELDON, & DE COURCY, JJ.

Tax, Excise. *Corporation*, Taxation. *Words*, "Merchandise," "Securities."

"Cash in bank," consisting of the amount standing to the credit of a domestic business corporation in a national bank or a trust company, is not included in the word "merchandise" nor the word "securities" in the provision of St. 1909, c. 490, Part III, § 43, relating to the excise imposed upon the franchises of such corporations, which provides that "the said tax upon the value of the corporate franchise of a domestic business corporation, after making the deductions provided for in section forty-one, shall not exceed a tax levied at the rate aforesaid upon an amount, less said deductions, twenty per cent in excess of the value, as found by the tax commissioner, of the works, structures, real estate, machinery, underground conduits, wires and pipes, and merchandise, and of securities which if owned by a natural person resident in this Commonwealth would be liable to taxation."

MORTON, J. This is a petition under St. 1909, c. 490, Part III, § 70, and acts in amendment thereof, for the abatement of a portion of a franchise tax assessed upon the petitioner for the year 1912 and paid by it in October of that year. The case was reserved* for the full court on the pleadings and agreed facts.

The petitioner is a Massachusetts corporation incorporated by St. 1909, c. 519, as amended by St. 1910, c. 639. By force of its charter it is subject to the provisions of St. 1909, c. 490, Part III, §§ 40, 41,

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* By *De Courcy*, J.

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42, 43, relating to the assessment and payment of taxes on the franchises of domestic business corporations. The only property which it had at the time of the assessment of the tax consisted of preferred and common stock in the Boston and Maine Railroad and $21,794.81, "cash in bank." The tax commissioner assessed the tax by determining the fair cash value of all the capital stock of the petitioner which, as provided in § 41, is to be taken as the true value of the corporate franchise, and which he found to be $28,804,958, and deducting therefrom the value of the preferred and common stock of the Boston and Maine Railroad, being "securities which if owned by a natural person resident" here, "would not be liable to taxation," which he found to be $22,909,346, and multiplying the balance, which he found to be $5,895,612, by the rate arrived at in the manner provided in said § 43. The amount so determined was the tax paid by the petitioner.

The petitioner contends that the maximum tax for which a corporation is liable under the statutes is a tax "upon an amount . . . twenty per cent in excess of the value, as found by the tax commissioner, of the works, structures, real estate, machinery, underground conduits, wires and pipes, and merchandise, and of securities which if owned by a natural person resident in this Commonwealth would be liable to taxation" (§ 43), and that this provision not being applicable to it because it has no such property, if the contention of the Commonwealth that the "cash in bank" is not included within the description of "merchandise" or securities " is correct, it follows that the tax should have been assessed upon it at the minimum rate.

If this is not so, then it contends that the "cash in bank" is included in "merchandise" or "securities," and that the tax should have been assessed upon an amount twenty per cent in excess of the "cash in bank." The Commonwealth concedes that if the "cash in bank" comes within the term "merchandise" or "securities" then the result contended for by the petitioner follows. But it denies that it properly can be so included.

We do not think that either contention of the petitioner can be sustained.

What is to be taxed is the corporate franchise. In order to tax it, its value must first be determined. The statute accordingly provides a method for arriving at that, and declares that when the

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value has been determined in the manner provided it shall be taken as the true value of the franchise (§ 41). The method provided is for the tax commissioner to ascertain from the returns or otherwise the true market value of the shares of the corporation and then to estimate therefrom the fair cash value of all the shares constituting the capital stock, and the amount so determined is declared, as we have said, for the purposes of the statute to be the true value of the corporate franchise. But obviously it would be unjust to include in such valuation for the purposes of taxation property belonging to the corporation in this or another State or country which was subject to local taxation. To do so would be in effect to cause double taxation. It also would be unjust to include securities which, if owned by a natural person resident here would not be liable to taxation. For to do so would be to indirectly subject such securities to taxation. Real estate and machinery subject to local taxation never have been included in the valuation of the franchise since the tax was instituted. For a collection of the statutes see *Farr Alpaca Co.* v. *Commonwealth*, 212 Mass. 156. Hence it is provided in § 41, paragraph "Third," as amended by St. 1910, c. 270, that "in case of a domestic business corporation, the value of the works, structures, real estate, machinery, poles, underground conduits, wires and pipes owned by it . . . subject to local taxation, and of securities which if owned by a natural person resident in this Commonwealth would not be liable to taxation; also the value of its property situated in another State or country and subject to taxation therein," shall be deducted from the value of the franchise. Manifestly, however, there can be no deduction if the corporation has no property of the kinds enumerated to be deducted, and the value of the franchise must remain as determined. It is the valuation thus determined either with or without deduction which forms the basis for the assessment. Section 43, which deals with the imposition of the tax, begins by providing that "Every corporation [what corporations are meant being defined] shall annually pay a tax upon its corporate franchise, after making the deductions provided for in section forty-one, at a rate," etc. The thing to be taxed is the franchise at the valuation determined unless abated by the deductions provided for. The twenty per cent clause is, in effect, a limitation upon the amount of the tax that otherwise would be

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assessed and comes into operation only when there are works, structures, real estate, etc., to which it can be applied. The twenty per cent is purely arbitrary, like the minimum rate, and no doubt was adopted by the Legislature because when added to the value of the works, structures, real estate, machinery, etc., and merchandise and of securities liable to taxation, the amount so determined was deemed by them to be a reasonable compromise for the purpose of taxation in regard to the value of the franchise of domestic business corporations. The petitioner is not what would ordinarily be understood as a business corporation, but it is expressly made subject so far as the valuation and taxation of its franchise is concerned to the same statutory provisions. Those provisions apply to it so far as its charter and the nature of its business and the kind of property belonging to and held by it admit. For the reasons stated we are of opinion that the tax complained of was assessed in conformity with such provisions so far as applicable.

The questions now presented were not before the court in *New England & Savannah Steamship Co.* v. *Commonwealth*, 195 Mass. 385, and in *American Glue Co.* v. *Commonwealth*, 195 Mass. 528. See *Farr Alpaca Co.* v. *Commonwealth*, 212 Mass. 156. It is possible that the construction which we have given to the statute might lead to results which could not have been contemplated by the Legislature. But if so, that is a matter for the Legislature to remedy, and not for us.

The petitioner further contends that the "cash in bank" is included in the term "merchandise" or the term "securities," and that the tax should have been assessed upon an amount twenty per cent in excess of that.

It is plain, we think, that it was not "merchandise." It does not come within any of the accepted definitions of that word: Bouvier's Law Dictionary; 20 Am. & Eng. Encyc. of Law, (2d ed.) 580; Century Dictionary; *Citizens' Bank* v. *Nantucket Steamboat Co.* 2 Story C. C. 16, 53, 54. It was not bank bills or specie, even if those might under some circumstances be called merchandise.

Neither do we think that it is included in the term "securities." It is not like money on deposit in a savings bank which is represented by a book containing the contract between the depositor

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and the bank which may be fairly said to be a security. In its ordinary acceptation the word "securities" includes bonds, certificates of stock or of deposit, notes, bills of exchange and other evidences of indebtedness or of property, and not mere choses in action (25 Am. & Eng. Encyc. of Law, 180; 35 Cyc. 1283, n. 59); and it is to be noted that the statute, in declaring what personal estate shall include for the purpose of taxation, couples together "public stocks and securities," but classes by itself "money at interest" and "money." St. 1909, c. 490, Part I, § 4. The deposit book in which sums deposited in a national bank or trust company are set down (assuming that the petitioner had one, which does not appear), is more in the nature of a memorandum between the depositor and depositary than of what is ordinarily understood as an evidence of indebtedness. See 1 Morse on Banks & Banking, §§ 290, 291. The "cash in bank" was for the purposes of taxation in the nature of money on hand rather than in the nature of a security. *Gray* v. *Street Commissioners*, 138 Mass. 414.

We think that the tax was rightly assessed, and that the petition should be dismissed.

Petition dismissed with costs.

C. F. Choate, (*F. A. Farnham* with him,) for the petitioner.

A. Marshall, Assistant Attorney General, for the Commonwealth.

STUART McNICOL'S (dependents') CASE.

Suffolk. June 10, 1913. — September 12, 1913.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DE COURCY, JJ.

Workmen's Compensation Act, Injuries included, Dependent beneficiary, Procedure, Decree of Superior Court. *Superior Court. Practice, Civil*, Appeal, Exceptions, Decree.

Under St. 1911, c. 751, Part II, § 1, which provides that payments of compensation under the workmen's compensation act shall be made where an employee "receives a personal injury arising out of and in the course of his employment," in order that a claim for such compensation should be sustained, it must appear that the injury had its origin in a risk connected with the employment and that it flowed from that source as a natural consequence.

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Injuries, resulting in death, received by a checker in the employ of a firm of importers, while doing his work at a dock, from blows or kicks given him by a fellow workman in "an intoxicated frenzy and passion," where such fellow workman was known to the superintendent in charge of the work to have the habit of drinking to intoxication and when in that condition to be quarrelsome, dangerous and unsafe to work with, and knowingly was permitted by such superintendent to continue to work on the day of the injury while in such a condition of intoxication, are injuries arising out of and received in the course of the workman's employment within the meaning of the workmen's compensation act.

Where compensation is to be made under the workmen's compensation act for injuries which resulted in the death of a workman, and it appears that the workman left a widow, and a daughter of himself and such widow under the age of eighteen years, both living with him at the time of his death, the provisions of St. 1911, c. 751, Part II, § 7, that the widow shall be conclusively presumed to have been wholly dependent upon her deceased husband, and that there shall be a like presumption in favor of such a minor child, "there being no surviving dependent parent," make the dependency of the child conditional on the non-existence of a surviving dependent parent, so that the whole of the payment is to be made to the widow.

Cases arising under the workmen's compensation act can be brought from the Superior Court before this court only by appeal and not by a bill of exceptions. Following *Gould's Case, ante,* 480.

St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, which provides that a party in interest may present certified copies of a decision of the Industrial Accident Board under the workmen's compensation act to the Superior Court, "whereupon said court shall render a decree in accordance therewith," does not make the action of the Superior Court a mere perfunctory registration of approval of the decision of the Industrial Accident Board, but means that the Superior Court shall exercise its judicial function by entering such a decree as will enforce the legal rights of the parties as disclosed by the facts appearing on the record.

RUGG, C. J. This is a proceeding under St. 1911, c. 751, as amended by St. 1912, c. 571, known as the workmen's compensation act, by dependent relatives for compensation for the death of Stuart McNicol.

1. The first question is whether the deceased received an "injury arising out of and in the course of his employment," within the meaning of those words in Part II, § 1 of the act. In order that compensation may be due the injury must both arise out of and also be received in the course of the employment. Neither alone is enough.

It is not easy nor necessary to the determination of the case at bar to give a comprehensive definition of these words which shall accurately include all cases embraced within the act and with precision exclude those outside its terms. It is sufficient to say that an injury is received "in the course of" the employment when it

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comes while the workman is doing the duty which he is employed to perform. It "arises out of" the employment, when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises "out of" the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be incidental to the character of the business and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.

The exact words to be interpreted are found in the English workmen's compensation act, and doubtless came thence into our act. Therefore decisions of English courts before the adoption of our act are entitled to weight. *Ryalls* v. *Mechanics' Mills*, 150 Mass. 190. It there had been held that injuries received from lightning on a high and unusually exposed scaffold, *Andrew* v. *Failsworth Industrial Society*, [1904] 2 K. B. 32; from the bite of a cat habitually kept in the place of employment, *Rowland* v. *Wright*, [1909] 1 K. B. 963; from a stone thrown by a boy from the top of a bridge at a locomotive passing underneath, *Challis* v. *London & Southwestern Railway*, [1905] 2 K. B. 154; and from an attack upon a cashier travelling with a large sum of money, *Nisbet* v. *Rayne & Burn*, [1910] 2 K. B. 689, all arose in the course and out of the employment, while the contrary had been held as to injuries resulting from a piece of iron thrown in anger by a boy in the same service, *Armitage* v. *Lancashire & Yorkshire Railway*, [1902] 2 K. B. 178; from fright at the incursion of an insect into the room, *Craske* v. *Wigan*, [1909] 2 K. B. 635; and from a felonious assault of the employer, *Blake* v. *Head*, 106 L. T. Rep. 822.

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The definition formulated above, when referred to the facts of these cases, reaches results in accord with their conclusions. Applying it to the facts of the present case, it seems plain that the injury of the deceased arose "out of and in the course of his employment." The findings of the Industrial Accident Board in substance are that Stuart McNicol, while in the performance of his duty at the Hoosac Tunnel Docks as a checker in the employ of a firm of importers, was injured and died as a result of "blows or kicks administered to him by . . . [Timothy] McCarthy," who was in "an intoxicated frenzy and passion." McCarthy was a fellow workman who "was in the habit of drinking to intoxication, and when intoxicated was quarrelsome and dangerous, and unsafe to be permitted to work with his fellow employees, all of which was known to the superintendent Matthews," who knowingly permitted him in such condition to continue at work during the day of the fatality, — which occurred in the afternoon. The injury came while the deceased was doing the work for which he was hired. It was due to the act of an obviously intoxicated fellow workman, whose quarrelsome disposition and inebriate condition were well known to the foreman of the employer. A natural result of the employment of a peaceable workman in company with a choleric drunkard might have been found to be an attack by the latter upon his companion. The case at bar is quite distinguishable from a stabbing by a drunken stranger, a felonious attack by a sober fellow workman, or even rough sport or horseplay by companions who might have been expected to be at work. Although it may be that, upon the facts here disclosed, a liability on the part of the employer for negligence at common law or under the employers' liability act might have arisen, this decision does not rest upon that ground, but upon the causal connection between the injury of the deceased and the conditions under which the defendant required him to work. A fall from a quay by a sailor while returning from shore leave, *Kitchenham* v. *Owners of S. S. Johannesburg*, [1911] 1 K. B. 523; *S. C.* [1911] A. C. 417; a sting from a wasp, *Amys* v. *Barton*, [1912] 1 K. B. 40; and a frost bite, *Warner* v. *Couchman*, [1912] A. C. 35, all have been held to be injuries not "arising out of" the employment. But we find nothing in any of them in conflict with our present conclusion. Nor is there anything at variance with it in *Mitchinson* v. *Day*

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Brothers, [1913] 1 K. B. 603, where it was held that injuries resulting from an assault by a drunken stranger upon an employee engaged at his work on the highway did not arise out of the employment. That was a quite different situation from the one now before us.

2. It is necessary to determine the persons to whom the payments provided for in the act shall be made. It may be assumed from this record that no personal representative of the deceased has been appointed. He left a widow and a minor daughter presumably under the age of eighteen years. Part II, § 7, provides that a wife conclusively shall be presumed to be wholly dependent upon a deceased husband, while a like presumption exists in favor of "a child or children under the age of eighteen years . . . upon the parent with whom he is or they are living at the time of the death of such parent, there being no surviving dependent parent." The natural meaning of this sentence is that the conclusive presumption of dependency of children is conditioned upon the nonexistence of a surviving dependent parent. There are no other words in this or other sections of the act which control its plain significance. The use of the plural word "dependents" in several places in §§ 6 and 8 in Part II finds ample justification in the many conceivable instances where several persons may be entitled to share in the payments when there is no surviving husband or wife.

The provisions of St. 6 Edw. VII, c. 58, § 13, as to the dependents entitled to payments are wholly different from those of our own act, and decisions of the English courts have no bearing on the case at bar.

3. The act does not contemplate the allowance of bills of exceptions, and that presented in the case at bar must be dismissed. The case is properly here on appeal. *Gould's Case, ante*, 480.

4. There is error in the decree. In the decree entered in the Superior Court the ruling of the board of arbitration was followed, providing that the payments should be divided equally between the widow and the dependent minor daughter, rather than that of the Industrial Accident Board that the widow alone was entitled to the payments. This was not in accordance with the act, as has been pointed out. Apparently the judge of the Superior Court exercised his own judgment as to the kind of decree which the law

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required upon the facts found. This is correct. Part III, § 11, of the act as amended by St. 1912, c. 571, § 14, provides that when copies of the "decision of the board . . . and all papers in connection therewith" have been transmitted to the Superior Court, "said court shall render a decree in accordance therewith." This means such a decree as the law requires upon the facts found by the board. It does not make the action of the Superior Court a mere perfunctory registration of approval of the conclusions of law reached by the Industrial Accident Board. The section in question doubtless was enacted because of the intimation in the *Opinion of the Justices*, 209 Mass. 607, 612, to the effect that the decisions of the board must be enforced by appropriate proceedings in court. The obligation placed upon the Superior Court by the requirement to enter a decree in accordance with the decision is to exercise its judicial function by entering such decree as will enforce the legal rights of the parties as disclosed by the facts appearing on the record.

It follows that the decree must be reversed and a new decree entered as required by this opinion.

So ordered.

The case was submitted on briefs.

E. C. Stone, for the insurer.

A. S. Apsey, for the dependents.

REUBEN J. PHILLIPS *vs.* METROPOLITAN PARK COMMISSION.

Suffolk. June 17, 1913. — September 12, 1913.

Present: RUGG, C. J., HAMMOND, BRALEY, SHELDON, & DE COURCY, JJ.

Veteran. Civil Service.

The definition of the word "veteran" in R. L. c. 19, § 20, designating those persons who are entitled to the veterans' preference under the civil service law provided for by that chapter, which includes "a citizen of this Commonwealth who distinguished himself by gallant and heroic conduct while serving in the army or navy of the United States and has received a medal of honor from the President of the United States," does not include one who served in the navy of the United States between 1898 and 1903 and for distinguished conduct in the presence of the enemy received a medal of honor from the Secretary of the Navy.

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The preference of veterans provided for in the civil service law is not to be extended by implication from equivocal words of the statute.

PETITION, filed on February 18, 1913, for a writ of mandamus directed to the members of the metropolitan park commission, commanding them to reinstate the petitioner in the rank and office of sergeant in the police department of that commission.

The case was submitted upon the pleadings and an agreed statement of facts to *Braley*, J., who at the request of the parties reported it for determination by the full court. If the petitioner, as matter of law, was a veteran within the meaning of R. L. c. 19, § 20, and the respondents under § 23 of that chapter as amended by St. 1910, c. 500, or under St. 1911, c. 624, had no power to remove him, a writ of mandamus was to issue; otherwise, the petition was to be dismissed with costs.

R. L. c. 19, § 20, is as follows: "The word 'veteran' in this chapter shall mean a person who served in the army or navy of the United States in the war of the rebellion and was honorably discharged therefrom, or a citizen of this Commonwealth who distinguished himself by gallant and heroic conduct while serving in the army or navy of the United States and has received a medal of honor from the President of the United States."

The case was submitted on briefs.

W. W. Stover & E. L. Sweetser, for the petitioner.

J. M. Swift, Attorney General, *& W. A. Powers*, Assistant Attorney General, for the respondents.

RUGG, C. J. The question presented is whether the petitioner is a "veteran" as defined in R. L. c. 19, § 20, in these words: "The word 'veteran' . . . shall mean . . . a citizen of this Commonwealth who distinguished himself by gallant and heroic conduct while serving in the army or navy of the United States and has received a medal of honor from the President of the United States." The petitioner served in the navy of the United States between 1898 and 1903 and received a medal of honor "for distinguished conduct in the presence of the enemy," which was (as stated in the letter of transmittal) "Awarded [him] by the Honorable, the Secretary of the Navy, under Act of Congress of March 3, 1901." That act (U. S. St. 1901, c. 850; 31 U. S. Sts. at Large, 1099) provides that in designated cases any enlisted man of the navy or marine corps "shall, upon the recommendation of his

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commanding officer, approved by the flag-officer and the Secretary of the Navy, receive" a medal of honor.

It is plain that the petitioner does not come within the literal description of our statute, for he did not receive his medal "from the President of the United States." The letter to him in which it was enclosed was signed by a colonel of the marine corps and stated that it was awarded by "the Secretary of the Navy," and the federal statute under which it was issued makes no reference to "the President of the United States," but provides that it shall issue when approved by the "Secretary of the Navy." The statute is in substance a standing regulation of the navy designed (as indicated in part by the title of the original act, of which the act under which the petitioner received his medal of honor is an amendment) "To establish and equalize the grade of line officers" of the navy, to provide for their advancement in rank and in general to promote the efficiency, to strengthen the discipline and to encourage valiant service in the navy.

The laws of the United States have recognized a different kind of medal of honor, commonly more restricted in character, to be presented by the President of the United States. Early instances are found in 2 U. S. Sts. at Large, 830, 831, where gold medals were awarded to Captain Hull of the frigate Constitution, to Captain Decatur of the frigate United States, to Captain Jones of the sloop of war Wasp and to Captain Bainbridge of the frigate Constitution, and silver medals to each commissioned officer of these vessels, all to be presented by the President of the United States. By resolution of Congress (3 U. S. Sts. at Large, 249) the President was requested to present a gold medal to General Jackson. By resolution of July 12, 1862, (12 U. S. Sts. at Large, 623,) the President of the United States was authorized to present medals of honor "to such non-commissioned officers and privates as shall most distinguish themselves by their gallantry in action and other soldier-like qualities, during the present insurrection." By § 6 of U. S. St. of March 3, 1863, c. 79, (12 U. S. Sts. at Large, 751,) the President was authorized to cause additional medals of honor to be struck and "present the same to such officers, non-commissioned officers, and privates as have most distinguished or who may hereafter most distinguish themselves in action." The terms of this act are not restricted as to time and appear to be a continuing

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authority limited only by the appropriation. By c. 1485 of U. S. St. of 1904, (33 U. S. Sts. at Large, 274,) provision was made for three thousand additional medals of honor to be presented by the President under like conditions. U. S. St. of 1905, c. 744, (33 U. S. Sts. at Large, 743,) makes provision for medals of honor to be presented by the President to those who show extreme daring in preventing accident or disaster upon railroads, and a joint resolution of July 6, 1912, (37 U. S. Sts. at Large, 639,) for the presentation by the President of a medal of honor to Captain Rostron of the steamship Carpathia.

On the other hand several federal statutes and resolutions of Congress provide for medals of honor to be issued by officers other than the President. 12 U. S. Sts. at Large, 330, 585. 29 U. S. Sts. at Large, 473. 30 U. S. Sts. at Large, 741. 31 U. S. Sts. at Large, 1099, 1465. U. S. Rev. Sts. § 1407.

It is obvious that a medal of honor presented by the President of the United States is a higher reward and a more distinguished decoration than one issued by a subordinate in the service. The acts of Congress to which reference has been made show a clear appreciation of this difference. Where such a difference between the two kinds of medals of honor has been recognized by the acts of Congress and where our statute refers by apt words to the one and not to the other, it is not reasonably possible to interpret these words as more inclusive than the natural significance of the words permits. If it had been the intention of the Legislature to comprehend recipients of medals of honor like that conferred upon the petitioner, it would have been simple to use words unmistakably expressive of that intention. If its intention had been to exclude them and confine the class to veterans of the civil war and those of the army and navy who had received presidential medals of honor, naturally the precise words of the statute would have been used. None others could have been chosen to express such an intent more accurately.

It is urged that the Secretary of the Navy is merely an administrative organ of the President and hence that his act is the act of the President. While this may be true in general, it does not follow that Congress cannot establish a distinction such as its statutes and resolutions plainly disclose between medals of honor awarded by each.

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This construction finds confirmation in the circumstance that the language occurs in the civil service law, the design of which is to secure efficiency in the public service and prevent discrimination in appointments to it based on any other consideration than fitness to perform its duties. It concerns a preference in favor of veterans, the constitutionality of which has been much debated, *Brown* v. *Russell*, 166 Mass. 14, and, although sustained by a majority of the justices in an advisory opinion, 166 Mass. 589, in any event cannot go beyond closely confined boundaries. Extension of such preference is not to be implied from equivocal words.

Petition dismissed.

CARLOS WARFIELD & others *vs.* A. D. F. ADAMS & others.

Suffolk. December 9, 10, 1912. — September 16, 1913.

Present: HAMMOND, LORING, BRALEY, & SHELDON, JJ.

Pledge. Equity Pleading and Practice, Exceptions to master's report, Recommitting master's report, Decree. *Equity Jurisdiction*, Conspiracy, Coming into court with clean hands, Plaintiff seeking equity must do equity.

In the absence of a special agreement to that effect, a pledgee of securities has no right to pledge the securities to a third person as collateral security for a loan to himself, and if a third person to whom such securities are pledged by the pledgee has notice that the person who pledged them to him held them as pledgee, he is put on inquiry to ascertain whether such pledgee had authority to repledge the securities.

Where a person, to whom securities were pledged by one who held them as pledgee, knew of the previous pledge and thus was put upon inquiry as to the pledgee's right to repledge the securities, and, if he had seen the note secured by the first pledge, would have discovered that such note bore interest at the rate of six per cent per annum while the note secured by the repledging to him bore interest at the rate of two or five per cent a month, and thus might have been charged with knowledge of bad faith on the part of the first pledgee in making the second pledge, it was *held*, that the second pledgee had a right to pursue the inquiry into the authority of the first pledgee to repledge by other means than the inspection of the note, and, if by such inquiry honestly conducted he learned that the right to repledge existed and gained no knowledge as to the bad faith of the first pledgee, he was not chargeable with such knowledge.

Where a suit in equity is referred to a master to hear and determine the merits of all the issues raised by the pleadings and to report to the court his findings of fact, his rulings of law and so much of the testimony as in his opinion may be necessary to a proper understanding of his rulings of law, a party has no right,

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by requesting certain findings of fact, to compel the master to adopt such findings or to give a reason for not adopting them.

Where a note secured by a pledge of securities contains a clause giving the pledgee the right to repledge the securities pledged to him, although not the right to sell them except in case of default, the authority to pledge the securities is confined to the original pledgee.

In a suit in equity against a number of defendants, where the bill alleges a conspiracy to defraud the plaintiff to which all of the defendants were parties, if the conspiracy alleged is proved to have existed among some of the defendants but not all of them, those against whom the conspiracy is proved may be held liable.

Where, in a suit in equity against a number of defendants, which was referred to a master under a rule requiring him to report his findings of fact and his rulings of law, it appears by the master's report that he gave certain erroneous rulings to the effect that the bill could not be maintained against one of the defendants for taking part in a conspiracy to defraud the plaintiff unless all of the defendants joined in the conspiracy, if it also appears by the report that on the facts found by the master wholly apart from these rulings the bill cannot be maintained against any of the defendants, the plaintiff has not been prejudiced by the erroneous rulings and his exceptions to the master's report based upon them must be overruled.

The ordinary rule here was applied, that the denial in a suit in equity of a motion to recommit a master's report is within the discretionary power of the trial judge, and in the present case no reason appeared for doubting that this discretion was exercised properly.

Where on an appeal from a decree in equity dismissing a bill against a number of defendants, in which the plaintiff's principal claim against the defendants was not established, it appeared from the facts in the master's report that the plaintiff had the right to redeem certain securities in the hands of some of the defendants, but, although there was no express disclaimer on the plaintiff's part as to this relief, there were indications in the master's report that the plaintiff did not ask for such redemption, it was *held* that the decree dismissing the bill would not be reversed on this ground unless the plaintiff moved for the reversal.

In a suit in equity by the pledgor of certain securities against the pledgee and other defendants, alleging that the securities were obtained from the plaintiff by a fraudulent conspiracy of all the defendants for the purpose of their unlawful use by the defendant pledgee in which the other defendants were alleged to have shared, if it appears that the plaintiff by causing apparent sales to be made had created a fictitious market value for the securities which he pledged to the defendant pledgee, and the greater part of which that defendant pledged to the other defendants, although these facts may give rise to a claim against the plaintiff for fraud and perhaps would have afforded ground for a rescission, they do not constitute such an unlawful inducement of the wrongful acts complained of that the court will refuse to entertain the plaintiff's suit; nor do these facts prevent the plaintiff from maintaining his bill on the doctrine that he who seeks equity must do equity.

LORING, J. This consolidated cause was begun by three bills in equity which as amended are brought by or in behalf of one Heinze, primarily to redeem certain securities pledged by Heinze as collateral for ten promissory notes in the aggregate sum of $300,000.

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These notes were dated between November 20, 1908, and April 5, 1909. Two of them were renewed at maturity, and with a possible exception of one note (about which there seems to be some doubt on the master's report) none were due when these bills were filed on June 29, October 13, and November 15, 1909.

The allegations of the three bills are much the same. It is alleged in them that at the time of making the loans Adams was insolvent and procured the pledge of the securities here in question for the fraudulent purpose of converting them to his own use. Joined with Adams as co-defendants are thirteen individuals, firms or corporations who furnished Adams with the $300,000 (or some of it) which was lent by him to Heinze, and who, it is alleged, conspired with Adams to carry the above fraud into effect and to share in the plunder. The secondary relief sought by the bills is for an accounting for the profits obtained by the defendants through the fraudulent conspiracies with Adams.

The case was sent to a master * to hear and determine the merits on all the issues raised by the pleadings and to report to the court his findings of facts, his rulings of law and so much of the testimony as in his opinion might be necessary to a proper understanding of his rulings of law. The master's report was confirmed and a decree was entered† dismissing the bill with costs as against all the defendants except Adams, and as against Adams the bill was dismissed without costs and without prejudice, the plaintiffs' counsel having told the master that in view of Adams's bankruptcy they did not care for a statement of the account against him.

The suit is here on an appeal taken by the plaintiffs from that decree.

It will not be necessary to state at length all the facts found by the master. For the purpose of deciding the questions raised by the plaintiffs' appeal the following are the facts which we deem material: Heinze was a large operator, particularly in mining stocks, and had promoted and "financed" the Davis-Daly Copper Company, the United Copper Company and the Ohio Copper Company. He managed and controlled these companies, and with his associates he owned their capital stock and bonds. The companies were known on the street as "Heinze companies," and

* F. Rockwood Hall, Esquire. † By order of *Hammond*, J.

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their securities as "Heinze securities." The stocks of all three were "non-dividend-paying curb stocks." In the autumn of 1908 and winter of 1909 Heinze had need of large sums of money for his various enterprises. Before that time he had been borrowing money in various parts of the United States and sometimes had had to pay interest at the rate of from two to five per cent per month, and in one instance at a still higher rate. His credit had been greatly impaired.

Under these circumstances, wishing to borrow $50,000 on stock of the United Copper Company and of the Davis-Daly Company, he applied to a New York note broker, Dresser by name, for his assistance. Dresser suggested to Heinze that he apply to the defendant Adams to see if he "could negotiate such a loan." Adams was known by Dresser, but not by Heinze. He had come from New York to Boston in 1906, without capital, and had conducted the business of lending and borrowing money on collateral. In addition he bought and sold some stocks in a small way. In October, 1909, "he went into bankruptcy." The master goes into a detailed statement of the business methods employed by Adams in his three years' business career in Boston. He states his methods before the first of the loans which he made to Heinze and then states that they remained the same during the ten Heinze loans. The money which Adams lent to his customers was obtained by him from others including the co-defendants, by repledging the securities pledged with him, and by paying for the money borrowed by him interest which "averaged from two to five per cent a month on monthly loans and renewals, and somewhat more than that on loans and renewals for a shorter time," in a few instances paying two per cent a week and one per cent a day.

In lending money Adams used a form of note substantially like that passed upon by this court in *Commonwealth* v. *Althause*, 207 Mass. 32. The clause in Adams's note was in these words: "In consideration of the loan hereby made the borrower agrees that the holder or holders of this obligation shall have the right to make use of the collateral security herein named as they may desire, subject only to their obligation to deliver to said borrower collateral of the same amount and kind as that mentioned above upon the payment of this note at maturity." In borrowing money, however, Adams used an ordinary collateral note which gave the holder a

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right to sell the collateral on breach of the agreements contained in the note, but not otherwise.

Adams lent Heinze $300,000 on the following ten notes secured by the following collateral:

Date	Amount	Time		Collateral
1908				
Nov. 20,	$50,000	6 mos.	15,000 shares	Davis-Daly Copper Co.
			3,000 "	United Copper Co.
Dec. 11,	50,000	6 mos.	15,000 "	Davis-Daly Copper Co.
			3,000 "	United Copper Co.
1909				
Jan. 28,	$10,000	3 mos.	5,000 "	Ohio Copper Co.
Feb. 3,	15,000	1 year	$30,000 bonds	" " "
" 10,	25,000	1 year	50,000 "	" " "
" 19,	25,000	1 year	50,000 "	" " "
" 24,	30,000	1 year	45,000 "	" " "
			2,500 shares	" " "
Mar. 5,	50,000	1 year	$50,000 bonds	" " "
			8,500 shares	" " "
" 25,	20,000	6 mos.	6,500 "	" " "
Apr. 5,	25,000	1 year	5,000 "	" " "
			2,000 "	United Copper Co.

The first two notes were signed by Heinze, the next seven by Warfield and the last one by Joyce. The first two were renewed at maturity for six months, and "with these two exceptions none of the plaintiff's loans were renewed." It follows that no notes were due when these bills in equity were filed unless it was the third note. If that was a note for three months it was two months overdue when the bills were filed. But throughout the report it seems to have been assumed that no notes were overdue at that time.

The ten promissory notes given by Heinze, Warfield and Joyce bore interest at six per cent per annum. On the first two notes Adams was paid in addition a commission of two per cent. But on the other eight he was not paid, nor was he entitled to receive, anything beyond interest at six per cent per annum.

In addition to the general statement that all the money lent by Adams to Heinze was borrowed from the co-defendants in these suits and from others who did a similar business of lending money at from two to five per cent a month, the master stated at length

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from whom Adams procured the $300,000 lent to Heinze. From this it appeared that by borrowing at the high rates of interest paid by him, Adams succeeded in not having to use by way of rehypothecation all the securities pledged to him by Heinze. The securities thus freed Adams used as collateral for money borrowed by him for his own use, or sold them, using the proceeds in the same way. The final finding of the master on Adams's intent is in these words:

"At the time of the first Heinze loan Adams was practically insolvent, and his creditors were clamoring for their money or securities. His purpose and intention in making this and the other nine loans was to thereby get possession of the collateral named in the notes, and, after using so much of it as might be necessary to raise the amount called for by the plaintiff's notes, to use the rest of it to get money to relieve his own financial distress and generally to use in his business, intending to return it if possible upon payment of the notes, and trusting to the future to enable him to do so, or, perhaps, through a break in the market and the consequent impairment of the twenty per cent margin stated in the plaintiff's notes or otherwise, to relieve him entirely from the necessity of so doing. He knew that the only way he could make money out of these transactions was by selling the pledged securities in the market, and buying them in at a much less price when the notes matured. It was a desperate chance, but he took it. He got large sums (in excess of the amounts he loaned the plaintiff) by loans on and sales of the plaintiff's collateral from time to time. These sums went into his general funds, and were used by him in paying interest and carrying charges on the loans he got from his co-defendants and others on the plaintiff's collateral, in making loans to others, in paying importunate creditors, in meeting his personal expenses, and generally in the conduct of his business."

As to the thirteen co-defendants the master made the following findings: "None of Adams's co-defendants were aware of his financial condition or aforesaid purpose and intention at the time of the first Heinze loan, nor thereafter during the first six months of 1909, nor had they reasonable cause to suspect it. He kept up the same appearance of prosperity as before, carrying about with him bank bills of large denominations and checks of large amounts, which he displayed ostentatiously from time to time, and boasting of his

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successful business. . . . He moved into a larger and more imposing suite of offices, with an increased office force, maintained an automobile and chauffeur, and in general gave the impression that he was financially prosperous." "I find that Adams' several co-defendants, subject to the modifications below as to Gale and Gould, and with the exception of Gove and C. P. George, knew or had reasonable cause to believe that the 'Heinze Securities' which Adams was pledging with or selling through them was collateral which had been pledged by the plaintiff with Adams as security for loans; that, as hereinbefore stated, they were all, without exception, familiar with the form of note which Adams used in making loans to customers, and believed that by its terms Adams had the right to divide the collateral, and re-hypothecate, or even to sell it, subject only to his obligation to deliver to the borrower collateral of the same amount and kind upon the payment of the note at maturity; that with the above exception as to Gove and C. P. George, and subject to the modification below as to Gale and Gould, they assumed, and under the circumstances were justified in assuming, that the plaintiff's notes to Adams, of whose terms, they were, however, ignorant, gave the same rights, and that under their terms Adams had a right to do with the collateral as he did. . . . Gale understood that the D. D., U. C., and Ohio companies were Heinze properties; knew that moneys loaned by him to Adams on the Heinze securities were sent over to New York; and had personal knowledge that Heinze was borrowing money on such securities in at least one instance in the name and on a note signed by another party, as well as in his own name. They both had information that Heinze was attempting, through Dresser and others, to borrow in the name of and through other parties, as well as in his own name, on Heinze securities in Boston. They neither of them assumed or considered whether the agreement between Adams and Heinze with reference to the use of these securities was expressed in the form of a note or in the form of some other contract, or whether the language of such note or contract was identical in phraseology with that contained in the notes which Adams used in loaning to other persons during the first period spoken of in this report. They both believed, and had reasonable cause to believe, that the pledges to them by Adams of said securities were fully authorized by Heinze, and they believed (although

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erroneously) that Adams was borrowing of them for Heinze, and as his agent, on the securities in question. . . . Gove had no knowledge and no cause to believe that any of the certificates of 'Heinze Securities' involved in this suit which were delivered to his office for sale were held by Adams as collateral for loans to anybody; that they got into Adams's possession improperly; or that he was making any improper or unauthorized use of them. C. P. George never heard of the plaintiff in connection with these transactions, and knew nothing of his notes to Adams. He believed that a part at least of the stocks and bonds which Adams pledged with him to secure his (George's) loans to Adams were stocks and bonds held by Adams as collateral for loans, and that, by the terms of the notes representing the same, Adams had a right to use the collateral as he did."

All loans made to Adams by the co-defendants and others were paid at the date of the filing of these bills, and all the plaintiffs' securities had been sold and disposed of except that one hundred and nine Ohio Copper Company's bonds were held by some of the co-defendants and fifty-one Ohio bonds by persons other than the co-defendants, to secure loans made by them to Adams.

The master summed up his findings in these words: "My conclusions are, and I find on all the evidence in the case: 1. That when they were given the plaintiff intended to pay at maturity the ten notes referred to in the bills, given by himself, Warfield, and Joyce to Adams, and to redeem the collateral deposited to secure the same. 2. That Adams did not make these ten loans, and procure the collateral given to secure the same, in good faith, but with a fraudulent intent. 3. That throughout their various dealings involving the plaintiff's collateral Adams's co-defendants acted, not in collusion with him or each other as alleged, but in good faith, without notice, knowledge, or information of any fraudulent intent on his part, or of any fraud practised or attempted by him upon either Heinze, Warfield, or Joyce, or that he was making any unauthorized use of the plaintiff's collateral."

The finding of bad faith on the part of Adams was amply justified by the facts found by the master. Were it important, further details could be stated which would demonstrate the correctness of this finding. But as Adams took no appeal from the decree it is not necessary to consider it so far as he is concerned. And in the

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view which we take of the case against the other defendants it is not necessary to go into the correctness of this finding so far as they are concerned.

So far as the main allegations of the bill go the master has found that the co-defendants did not in fact conspire with Adams to rob Heinze. The evidence before the master is not before us. On the facts found by him we see no reason for disturbing this finding of fact. In that connection the master made this finding: "I find that, considering the time of the loans and the nature of the collateral, the sums paid by Adams therefor as above were not extortionate nor unreasonably large, and (if material) that they were the usual and current rates at the time on loans of that kind." The evidence on which this finding was made is not before us, and we cannot say that it was wrong.

We take up first the question of the liability of the defendants who lent money to Adams knowing or believing that the securities given by him to them as collateral were "collateral which had been pledged by the plaintiff with Adams as security for loans" made by him to Heinze.

If these co-defendants are liable on the findings made by the master, they are liable because they were put on inquiry. And if they were put on inquiry it is of no consequence whether the securities taken by them were or were not negotiable securities. In that connection it is of no consequence what they believed were the terms of the notes on which Adams lent money to Heinze, nor what counsel had advised them was the true construction of those notes. The advice given them by counsel and their belief in that connection were of importance on the question of their having been privy to the fraud committed by Adams. But in connection with their liability on the ground that they were put on inquiry those facts are not of consequence.

It nowhere appears that the co-defendants knew that Adams was lending to Heinze at six per cent per annum the money which he was borrowing of them at from two to five per cent per month. Had they known that, it would have been hard to believe that they did not know of his *mala fides* or to hold that they were not put on inquiry as to it.

But these co-defendants (with the exception of Gove and C. P. George) knew that the securities pledged by Adams for money

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lent by them to him were securities pledged by Heinze to Adams for money lent by Adams to him, or to Warfield and Joyce for his benefit. A pledgee has no right to separate collateral from the debt for which it is pledged and to re-hypothecate it for a new loan made to him by a third person. A pledgee (in the absence of a special agreement) is bound to hold the collateral pledged to him as security for the debt for which it was pledged so that the pledgor can redeem his property at any time by paying the debt for which it is security. Consequently when it came to the knowledge of these defendants that the securities given by Adams to them as collateral for money lent by them to Adams were securities held by Adams as collateral for money lent by him to Heinze, they were put on inquiry to ascertain whether Adams had authority to separate Heinze's securities from Heinze's notes and to re-hypothecate them for loans made by them to him, Adams. If they had made that inquiry they would have found that Adams, so long as he acted *bona fide*, did have that authority. It is not plain whether the construction of these ten notes is to be governed by the law of Massachusetts or by the law of New York. The first two were dated in New York and were delivered in Massachusetts, while the other eight were dated in Boston and delivered in New York. So far as the case tried before the master was concerned it was not necessary to decide which of the two States was to be looked to on the question of construction. By the law of Massachusetts as well as of New York, these notes gave the holder authority to re-hypothecate the collateral held by him as pledgee. The decision in *Ogden* v. *Lathrop*, 65 N. Y. 158, was put in evidence to prove the law in New York. Although the question there decided was the holder's right to sell under a note not altogether like the ten notes here in question, we are satisfied that these notes, construed as New York contracts, give the holder a right to re-hypothecate the collateral. And so far as Massachusetts is concerned the opinion in *Commonwealth* v. *Althause*, 207 Mass. 32, is decisive upon that point. It was held in *Commonwealth* v. *Althause* that a note in the form of those given in the case at bar by Heinze, or in his behalf by Warfield and Joyce, does not give the holder a right to sell the collateral if the maker of the note is not in default. This conclusion was reached on the ground that the clause authorizing the holder of the note to make "use" of the

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collateral must be taken to have been inserted to enable him to separate the collateral from the note and pledge it alone or mingled with other securities *en bloc* as collateral for money lent to him. Adams had no right to re-hypothecate Heinze's collateral as he did in these suits. But that was because he acted *mala fide*, not because his authority was not sufficient for similar acts of re-hypothecation done *bona fide*.

As we have said, if these defendants had known that Adams was lending to Heinze at six per cent per annum and borrowing the money so lent at an average of from two to five per cent a month, that fact in our opinion would have been notice of Adams's bad faith. On the findings made by the master the defendants were put on inquiry as to Adams's authority to re-hypothecate but not as to his bad faith. If in pursuing the inquiry as to his authority to re-hypothecate they necessarily would have learned of his bad faith, it may be assumed that they are chargeable with knowledge of it although not put on inquiry as to it. The question therefore comes to this: Were these defendants, in pursuing the inquiry as to Adams's power to re-hypothecate Heinze's securities, bound to see Heinze's notes held by Adams? If they were, it may be that they are chargeable with knowledge of Adams's bad faith, for in that case they would have learned that he was lending Heinze at six per cent per annum the money which he was borrowing of them at from two to five per cent a month. But if they were justified in pursuing the inquiry (which they were bound to make as to Adams's power to re-hypothecate) in any other way or ways than by inspection of the executed notes, they are not chargeable with knowledge of his bad faith. We are of opinion that they were not limited to informing themselves by inspection of the notes, and therefore that they are not chargeable with knowledge of his bad faith.

Where the construction of these ten notes is governed by the law of Massachusetts, and perhaps where it is governed by the law of New York, sales of collateral made by Adams were made without right. So far as Massachusetts is concerned that was decided in *Commonwealth* v. *Althause*, 207 Mass. 32. And sales, if any, made by a co-defendant were wrongful which were not made for default on the part of Adams, under the notes given by Adams for payment of which Adams re-hypothecated the collateral under

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the power so to do which he had under the ten notes given him by Heinze. Some of these tortious sales were made by some of the defendants as brokers and some of the securities thus tortiously sold on Adams's orders seem to have been delivered by the defendants, who held them as security for money lent by them to Adams and who received the proceeds of the sales in payment of loans made by them to Adams. The plaintiffs have not sought to charge the defendants who are brokers for sales made by them under the doctrine of *Coles* v. *Clark*, 3 Cush. 399, for injury to the reversionary interest which Heinze had in the securities sold (as to which see *Hodgkins* v. *Bowser*, 195 Mass. 141). Nor have they sought to charge with liability those of the defendants who delivered the securities sold and received the proceeds in payment of Adams's debt to them under the doctrine of *Varney* v. *Curtis*, 213 Mass. 309, and the master has not reported the facts on which the possible liability of the co-defendants on these grounds depends. What the construction of the ten notes is if governed by the law of New York is not altogether plain. As we have said, the only evidence introduced as to the law of New York was *Ogden* v. *Lathrop*, 65 N. Y. 158. If the plaintiffs get leave to amend their bills so as to prosecute the claims which we have just stated, all these questions will have to be tried and decided. At present it is not necessary to consider them.

We have not found anything in the cases cited by the plaintiffs which requires special notice.

In addition to the matters which we have now considered, the plaintiffs have argued twenty-two exceptions to the master's report and an appeal from a refusal of the single justice to recommit the case for further hearing by the master. One of the twenty-two exceptions argued (No. 68) consists of the refusal by the master to give twenty-seven requests for rulings asked for by the plaintiffs, and another (No. 69) is to the adoption by the master of six rulings asked for by the defendant Gove.

We first take up the forty-fifth exception because it is typical of many others. The forty-fifth exception is in these words: "The plaintiffs except to the finding, to the refusal to find, and to the failure to report the evidence set forth in the forty-fifth written objection, — (a) Because the facts requested are material to the issues in the cause and the master has not stated that the same are

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not supported by the evidence or given any reason for his refusal to so report: (b) Because the master does not find sufficient facts to warrant the conclusions which he draws, and if his conclusions are founded on other facts, the same should have been reported: (c) Because the evidence requested is necessary to a proper understanding of the rulings." "The evidence set forth in the forty-fifth written objection" was as follows: "His general course of dealing with the defendants after the Heinze loans were made was the same as prior thereto. Adams still advertised in the same manner and with the same frequency; continued to renew loans instead of paying them; continued to pay them in the same manner; continued to give the defendants directions to sell collateral placed with them for the payment of principal and interest; continued to fail to give them his own checks for any substantial sums; he continued to give them checks dated ahead in payment of interest; he continued to swap checks with them; he continued to fail to keep his promises. He received threatening and dunning letters from the defendants. He continued to pay the same rates of interest and commissions.

"Prior to June, 1909, he occupied one small office in the Exchange Building and was neither a member of the Curb or the Boston Exchange.

"Gale and Gould agreed to make a clearance June 9, 1909, which was not carried out. Gould, however, charged Adams $1,000 for the use of $12,500 for a week, although it had not left Gould's possession, and to pay himself $1,000 he later sold one hundred shares of Davis-Daly stock which he held as collateral to the loan, which was not payable and which had been deposited with him by the defendant Adams.

"In May, 1909, for a clearance of $25,000 by Bloom for Adams, Bloom charged him a commission for the use of money for five days of $1,250, or practically four times the usual rate.

"Practically all the sales made by Gale and Gould of the plaintiff's securities were deliveries to brokers. All of the plaintiff's securities which were sold by the defendants Gale and Gould were made through Barnum as their agent and the brokers through whom the sales were made were the defendants Cawley and Gove."

The consolidated cause now before us was referred to the master under a rule which did not secure to the parties a right to have the

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master's findings of fact reviewed by the single justice and on appeal by the full court under R. L. c. 159, §§ 19, 24. That is to say, the rule to the master in the case at bar did not direct the master to report, in whole or in part, the evidence on which he made his findings of fact. The rule did direct him to report to the court "so much of the testimony as in his opinion may be necessary to a proper understanding of said [the master's] rulings" of law. That was inserted to enable the parties to have rulings of law made by the master reviewed by the court. The rule to the master in the case at bar was designed to leave and did leave to the final determination of the master the decision of the facts involved in the issues raised by the pleadings. In case of such a reference to a master (unless the cause is recommitted to him for further consideration), the defeated party is limited to arguing, so far as the master's findings of fact are concerned, that on the facts found the final conclusion of fact drawn by the master was wrong. The plaintiffs in these suits, however, have undertaken to have the findings of fact made by the master reviewed by the court. As the foundation for that attempt they filed with the master, before he made his final report, two hundred and fifty-nine requests for findings of fact, and after the draft report was made they filed ninety-nine suggestions for alterations, which, to some extent at least (as was the case of the eighty-third suggestion incorporated in the forty-fifth objection on which the forty-fifth exception now under consideration is founded), included a request for a finding of fact. Having made these requests for findings of fact they now contend that the master must state that the same are not supported by the evidence, or give some reason for his refusal to insert them in his report. It is proper for counsel as part of an argument on facts to submit to a master requests for findings of fact, and a master may in his discretion receive, but he is not bound to receive, such requests for findings. The master's duty is to decide the issues of fact and, under the particular rule of reference made in these suits, to rule on the questions of law on which the merits of the suits depend. The parties have a right to submit to a master requests for rulings of law which are involved in matters which he is to decide, because they have a right to have his findings made under the rulings of law which correctly define the rights of the parties on the issues of fact raised by the pleadings.

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But when by the terms of the rule of reference the master is to make a final determination of the facts put in issue in the pleadings, there is no room for filing requests for findings of fact which the master must adopt or give a reason for not adopting. Such a proceeding is putting on trial the master in place of the issues raised by the pleadings. The practice is one which should not be encouraged. Take these suits as an example. It took over a year (from October 26, 1909, to December 20, 1910,) to put in the evidence. The evidence filled seven thousand typewritten pages. How long the master had it under consideration does not appear. But his report was made on May 9, 1912, a year and a half after the evidence was closed. It would be impracticable to try such a cause if (as the plaintiffs have assumed) the master was bound to adopt or give a reason for not adopting each one of the two hundred and fifty-nine requests for findings made by the plaintiffs before the draft report was made and the ninety-nine suggestions for alterations (apparently new requests for findings) made by them after the draft report was submitted to the parties. It is to be remembered that these two hundred and fifty-nine plus ninety-nine are the requests for findings made by the plaintiffs alone, and that there were fourteen defendants who, if the plaintiffs' course of action is justified, had a right to make similar requests for findings which the master was bound to adopt or give a reason for not adopting. It should be added to what has been said already that the requests for findings of fact in these suits and generally are findings in words selected by the plaintiffs on a detached matter which, if adopted, would have to be considered in connection with other findings which would have to be modified if the exact truth were stated.

For the reasons already stated we are of opinion that the forty-fifth exception taken to the master's report must be overruled.

Taking up the other exceptions in their order. The fact that the defendants (who the master found believed that under the form of note here in question Adams had a right to sell the collateral pledged with him) knew that he was selling it, must be taken to have been intended to be found by the master; and the ninth exception must be overruled.

Whether Adams's "appearance of prosperity" corroborated the assurances which he gave to the defendants that he was making

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money is a matter which cannot be considered apart from all the circumstances in evidence, and they are not before us. The fifteenth exception must be overruled.

The sixteenth, eighteenth, twenty-first, twenty-seventh, twenty-eighth, thirty-ninth, forty-fourth, fifty-sixth (in part) and fifty-seventh exceptions are disposed of by what we have said as to the forty-fifth; and the seventeenth, twentieth, twenty-fourth twenty-fifth, fifty-sixth (in part) and sixty-fourth, by what has been said as to the fifteenth. As the master ruled on his findings that no defendant but Adams was liable and the plaintiffs disclaimed having an account stated to charge him, the master was right in not stating the account as against Adams, and the sixty-second exception must be overruled.

We proceed to deal with the sixty-eighth exception which is to the refusal of the master to adopt twenty-seven rulings of law asked for by the plaintiffs.

The rulings asked for by the plaintiffs numbered 2–21, inclusive, were not passed upon by the master. If the bill is amended as hereinbefore suggested, it will be necessary to rule on the matters covered by these rulings, and we consider them for that reason. We already have held that the ten notes did not give the holder a right to sell except on default by the maker. But he had a right to re-hypothecate the securities and pledge them alone or *en bloc* mixed with other securities for a new loan made to him. We do not know just what the plaintiffs mean by the proposition that the right of re-hypothecation is such that it must be made "on such terms and conditions and at such rates of interest that the control of it would remain with the first pledgee." Of course the original pledgee who re-hypothecates collateral under this clause has control of the securities no matter what the terms and condition of the re-hypothecation are, and no matter what the rate of interest is. Since his use of the collateral is limited to a re-hypothecation of it, he has control of it because he can redeem the re-hypothecated securities by paying the note for security of which the collateral is re-hypothecated. If by this ruling the plaintiffs mean that one lending to the holder of such a note cannot get rights in the re-hypothecated collateral other than those which the holder had, the ruling is wrong. The very purpose of inserting in the note this clause (which gives to the holder the right "to make use of the

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collateral") is to enable him in re-hypothecating the collateral securities to give to the new pledgee rights in the re-hypothecated securities other than those which his pledgor (the original pledgee) had. Of course the original pledgee, on being paid the note held by him, is bound to return to the original pledgor the original collateral securities or "collateral of the same amount and kind." But that obligation on the part of the original pledgee does not limit the right to re-hypothecate the securities pledged to him which is given to him by the special clause. As it was found by the master that Adams in borrowing money used a form of note which did not contain this clause giving the holder a right to use the collateral, the master seems to have been right in not finding it necessary to give the requests numbered 2–21. But that question may become material before the master on the recommittal of the report. Without doubt the right to make use of the collateral given by this special clause is confined to the original pledgee.

From what has been said in the earlier part of this opinion it is apparent that the plaintiffs were not prejudiced by the master's refusal to give the twenty-second, twenty-fourth, twenty-fifth (without the qualification he added), twenty-sixth, twenty-seventh and twenty-eighth requests for rulings. The thirtieth ruling was not borne out by the evidence.

This brings us to the sixty-ninth exception, which is an exception to six rulings given by the master at the request of the defendant Gove. The first two of these rulings were wrong. The conspiracy charged in the third bill (to which alone the defendant Gove was a party) alleged a conspiracy to which all the co-defendants were parties. If under such a bill a conspiracy between Adams and some one or more of the co-defendants had been proved, the plaintiffs would have been entitled to a decree against Adams and them. The master therefore was wrong in ruling at the request of the defendant Gove that to succeed against any defendant the plaintiffs must prove a fraudulent scheme "in which all the parties defendant were engaged," and that this bill cannot be maintained unless the plaintiffs prove "that the other defendants [meaning the co-defendants other than Gove] corruptly conspired with Adams." It is apparent that the finding of facts made by the master was not affected by these erroneous rulings of law. They

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were rulings of law as to the liability of the co-defendants on the findings of fact and not rulings of law which affected those findings. On the findings of the master the co-defendants are not liable for reasons already stated apart from the fact that they were not liable by reason of these erroneous rulings of law. Under these circumstances the plaintiffs are not prejudiced by these rulings of law and the exceptions to the master's report based upon them must be overruled.

The plaintiffs do not now contest the correctness of the tenth, eleventh and twelfth rulings given at the request of Gove unless the defendants were put on inquiry.

The motion to recommit was addressed to the discretion of the single justice. We see no reason for doubting that this discretion was properly exercised by him.

In addition to the ground for holding the co-defendants liable which we already have referred to as not covered by the bill nor by the findings of the master, the plaintiffs on the findings made by the master were entitled to some relief against them. From the master's report it appears that eight of the thirteen co-defendants still hold as security for money lent by them to Adams some of the securities originally pledged by Heinze as collateral for the ten notes or for some of them. Heinze has a right to redeem these securities on which Adams originally had a lien for money lent by him to Heinze and on which (under the findings made in the master's report) these defendants have a lien for money lent by them to Adams. But although there is no express disclaimer on the plaintiffs' part so far as this relief is concerned, there are indications in the master's report that the plaintiffs did not ask for it. Under these circumstances we are of opinion that the decree dismissing the bill as against the co-defendants should not be reversed on this ground unless the plaintiffs ask that that be done.

Some of the defendants have contended that under no circumstances are the plaintiffs entitled to any relief. The defendant Barnum contends that there is a finding of the master which prevents the plaintiffs from maintaining this bill. The master found incidentally that Heinze had caused a fictitious market value to be made for the securities by causing apparent sales to be made by one broker to another, both of whom were acting as his agents. Barnum relies also upon a finding of the master that he (Barnum) and

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some other co-defendants were induced to lend money to Adams on Ohio Copper Company bonds on the faith of a telegram sent by Warfield to Adams to be used by Adams in getting money on Ohio Copper Company bonds. This telegram stated that Shoemaker, Bates and Company were ready to buy these bonds at $900 a bond. Shoemaker, Bates and Company were brokers employed by Heinze to give a fictitious value to these bonds, and the fact was that they were ready to buy them for Heinze at that price to sustain the market. Of these facts "Adams and his co-defendants were ignorant." A similar contention is made by the defendants the Shawmut Commercial Paper Company and Demelman. These facts may give rise to a claim for fraud and perhaps for rescission, but in our opinion it is not such a *turpis causa* that the court will refuse to entertain a suit by Heinze or in his behalf.

Nor do these facts prevent the plaintiffs from maintaining this bill on the doctrine that he who seeks equity must do equity as has been contended in behalf of the defense.

The defendants Mason and Potter have contended that on the findings of the master the plaintiffs are estopped from contesting the validity of sales made by Adams. The whole of the finding in this connection is in these words: "Early in January, 1909, and from time to time thereafter, the plaintiff [Heinze] learned that some of the very securities he had pledged with Adams were appearing in the market, and he believed that Adams was selling them. This belief led to the insertion in the note of March 25 of the restriction against selling the collateral hereinbefore referred to, and the clause in Adams's receipt of April 5, binding him to return the identical certificates pledged to secure Joyce's note of that date. During this time Adams was selling the plaintiff's collateral as occasion required, although he denied it when from time to time accused of so doing by the plaintiff [Heinze] or his associates, and at all times did what he could to prevent the knowledge of it from reaching them." Clearly no estoppel on the part of Heinze arises as against unknown persons to whom Adams under these circumstances was wrongfully selling these securities.

Unless the plaintiffs within ninety days from the date of the rescript in this case file in the clerk's office of the Supreme Judicial Court for the county of Suffolk a statement in writing that they

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wish to redeem the bonds now held by some of the co-defendants, or unless within said ninety days they shall obtain leave to amend their bills of complaint in the way already indicated, the decree appealed from is affirmed with costs. If within said ninety days such a statement in writing is filed, or if such an amendment is allowed, the decree dismissing the bill as against the co-defendants in question or all of it is to be reversed and the cause is to stand for hearing for one or the other, or for both purposes; and it is

So ordered.

C. M. Wood & W. I. Badger, (*W. H. Hitchcock* with him,) for the plaintiffs.

B. B. Jones, for the defendant Gale.

H. F. Hurlburt, Jr., for the defendant Barnum.

D. E. Gould, pro se.

E. M. Schwarzenberg, for the defendants Shawmut Commercial Paper Company and Demelman.

H. H. Bond, for the defendants Mason and Potter.

A. K. Cohen & H. A. Mintz, for the defendant Bloom, submitted a brief.

C. W. Rowley, for the defendant Adams, submitted a brief.

ABBIE L. MOULTON *vs.* COMMONWEALTH.

Suffolk. June 16, 1913. — September 17, 1913.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DE COURCY, JJ.

Practice, Criminal, Sentence, Imprisonment of women. *Uttering Forged Order for Money. Reformatory Prison for Women.*

Since St. 1909, c. 442, took effect, a male person who commits the crime of uttering a forged order for money not exceeding $50 in value may be sentenced by a police, district or municipal court to imprisonment at hard labor in a house of correction.

Under St. 1906, c. 282, § 1, which provides that "the sentence of a female who is convicted of a felony shall be executed in the reformatory prison for women only," a sentence of a woman to imprisonment at hard labor in a house of correction for uttering a forged order for money not exceeding $50 in value is unauthorized, and, upon a writ of error, will be reversed.

St. 1906, c. 282, § 1, which provides that "the sentence of a female who is convicted of a felony shall be executed in the reformatory prison for women only," does not

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make the reformatory prison for women when used for the punishment of felony a branch of the State prison, and makes unlawful a sentence of a woman for a felony to a jail or a house of correction as well as a sentence to the State prison.

BRALEY, J. This is a writ of error to reverse a judgment of the Municipal Court of the City of Boston by which the plaintiff in error was sentenced to imprisonment at hard labor for one year in the house of correction at Deer Island for the crime of uttering a forged order for money.

By the R. L. c. 209, § 1, the crime for which the plaintiff in error was convicted and sentenced, namely, that of uttering and publishing as true a false, forged and counterfeited order for the payment of money, may be punished by imprisonment in the State prison for not more than ten years or in jail for not more than two years. It is therefore a felony as defined by R. L. c. 215, § 1, and until the St. of 1909, c. 442, the Municipal Court was without final jurisdiction and could not impose sentence. R. L. c. 160, § 1. By the St. 1909, c. 442, the jurisdiction of police, district and municipal courts in criminal cases was so enlarged as to include among other crimes, that of forgery of a promissory note or of an order for money or other property where the sum of money named in the note or the value of the property named in the order did not exceed $50, with power to impose the same sentence as the Superior Court in like cases, except imprisonment in the State prison. The amount named in the order or check not having exceeded this jurisdictional requirement, it is plain that upon conviction the Municipal Court could have sentenced a male to imprisonment at hard labor in the house of correction, but not to the State prison. R. L. c. 220, § 5. *Commonwealth* v. *Cline*, 213 Mass. 225, 228.

The plaintiff in error, however, is within the St. of 1906, c. 282, § 1, which provides that "The sentence of a female who is convicted of a felony shall be executed in the reformatory prison for women only . . .," and the St. of 1903, c. 209, requiring that the court or trial justice imposing sentence shall not prescribe the limit unless it is for a term of more than five years. The St. of 1906, c. 282, is mandatory. It is irreconcilable with the provisions of R. L. c. 220, § 16, as amended by the St. of 1904, c. 224, that a sentence of a female convict to confinement at hard labor shall be executed in the house of correction or reformatory prison for women as the court orders. The later statute is unambiguous, and the purpose

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of the Legislature is unmistakable. It would be defeated if the R. L. c. 220, § 16, is treated as still in force. The crime itself, or its punishment by imprisonment, is not affected by these enactments. But the place where judgment shall be executed is no longer optional with the court. The reformatory prison for women has been substituted for the jail or house of correction. It is true there is no express repeal. If, however, an earlier statute is repugnant to the subsequent act the presumption is, that the latter statute is intended as the final expression of the legislative will, and the former statute is necessarily repealed by implication. *Commonwealth* v. *Wyman*, 12 Cush. 237, 238, 239. See *Copeland* v. *Springfield*, 166 Mass. 498, 504; *Paszkowski* v. *Stony Brook Paper Co.* 210 Mass. 86, 89.

It is urged by the defendant in error, that the reformatory prison for women must be ranked as synonymous with the State prison, or in other words that it is a branch of the State prison, when the place of punishment of women convicted for felony is under consideration. It is not so denominated in our laws. While subject to the supervision of the prison commissioners, its discipline and management are not only distinctive, but entirely independent of other penal institutions, and it is supported by an annual separate appropriation. It was established by the St. of 1874, c. 385, and by that act as well as in subsequent statutes and revisions the intention of the Legislature to provide a separate place for the detention, punishment and reformation of women convicts is plainly manifest. Pub. Sts. c. 221, § 43. St. 1887, c. 426, § 1. St. 1896, c. 304. R. L. c. 223, §§ 28–39. St. 1906, c. 282. The sentence to imprisonment in the house of correction at hard labor for the term of one year having been unauthorized, the judgment must be reversed.

So ordered.

The case was submitted on briefs.

F. Keezer, for the plaintiff in error.

J. M. Swift, Attorney General, *& J. F. Barry*, for the Commonwealth.

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HENRY L. HOBART & others *vs.* GEORGE LUBARSKY & others.

Suffolk. January 14, 1913. — October 20, 1913.

Present: RUGG, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Contract, In writing. *Agency*, Broker.

A merchandise broker, who has negotiated a sale between a seller and buyer of goods, is authorized by virtue of his employment to write out and sign bought and sold notes as memoranda of the agreement to make it binding under R. L. c. 74, § 5, but he has no authority as broker to make a contract in writing for the parties; and an action for the non-delivery of goods cannot be maintained against the alleged seller of the goods upon a sold note signed in his behalf by a broker, which is declared upon as a contract in writing. If the buyer has a remedy, it is by an action on the oral agreement, of which the sold note must be alleged to be a memorandum, and the plaintiff in order to recover must show that the defendant authorized the broker to make in his behalf the oral contract of sale which the plaintiff alleges was broken.

LORING, J. There was a mistrial in this cause. The case was in substance as follows: Naisawald and Son of New York were molasses brokers and the defendants Kaplan and Lubarsky dealt in molasses under the firm name of the Sugar Products Company. There was evidence that in April, 1909, Kaplan on behalf of the Sugar Products Company employed Naisawald to find a purchaser for some six thousand barrels of Porto Rico molasses, "known by the sample of 'Blue M grade,'" of which he gave Naisawald a sample. Pursuant to this Naisawald brought the molasses to the plaintiffs' attention and they finally offered to buy it for ten and seven-eighths cents a gallon provided the Sugar Products Company would procure a responsible person to guarantee fulfilment of the contract. Upon this being reported by Naisawald to the defendant Kaplan the two went to the office of one Bernstein, where the terms of the proposed sale to the plaintiffs were discussed by Naisawald, Kaplan and Bernstein. After the terms had been settled Naisawald wrote out in pencil a rough memorandum of them and read it to Kaplan and Bernstein, and on their agreeing to the terms there stated he went to the telephone and read the memorandum to Christianson (one of the plaintiffs), who (he testified)

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assented to it. There also was evidence that the plaintiffs accepted Bernstein as a satisfactory guarantor. It appeared from the testimony both of Naisawald and of Christianson (witnesses for the plaintiffs) that Naisawald came to the office of the plaintiffs after the interview with Bernstein which has just been stated, and that Christianson then called Naisawald's attention to the fact that by the terms of the bid which he originally made the cargoes were to be "sail cargoes." In consequence of that Christianson inserted in the rough memorandum in purple pencil the words ["sail cargo."] He also inserted in it the word ["buyers."] A copy of the rough memorandum is to be found in a footnote.* Later in the day he

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* [The words interlined in purple pencil are the words in brackets.]

"B. Bernstein & Son,
Manufacturers of
Fine Clothing,
626 Broadway,
Telephone, 4267 Spring

Barnet Bernstein
to this contract
Edward Bernstein

New York, Ap 28 1909

Sold for a/c Sugar Products Co.
To H. L. Hobart & Co.
about 6000 Brls Porto Rico molasses, as per sample marked & known as Blue M

5 days

@ 10.7/8c per gall net cash — after goods have been landed accepted gauged & coopered — Buyers option of 4 ports N. Y. Phila Balt or Boston [sail cargo] [buyers] giving sellers ample time as to destination.

To be in and cooperage Molasses or syrup or Glucose Iron bound large barrels — gauging 50 to 60 gal
shipment 2500 Brl in June
shipment 3500 " August September
but this latter quantity subject to confirmation by cable from P. R. not later than about Monday May 3rd buyers agreeing to advance 35% against Bill Lading & Insurance certificate as cargoes are completed B. Bernstein & Son endorsing the same — also being a party or endorsers."

[Sales note.]

"Louis C. Naisawald & Son.
Rice, Sugar, Molasses & Syrups.
102 Wall Street,
New York, April 26th, 1909.

Telephone, John 631.

Sold for a/c Sugar Products Co., New York City, N. Y.
To H. L. Hobart & Co., New York City, N. Y.

About 6,000 barrels of Porto Rico Molasses, as per sample marked and known as BLUE M.,

at 10-7/8¢ per gallon, Net Cash, Five (5) days after goods have been landed,

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wrote out in duplicate a more formal sales note which followed the substance of the rough memorandum thus altered (a copy of which is also to be found in the footnote). The next morning Naisawald presented the duplicate sales notes to Bernstein and he signed them as guarantor. On their being presented to the plaintiffs they wrote across the face: "Approved, Henry L. Hobart & Co." Later, on the same day, Naisawald presented the two duplicate original sales notes to Kaplan, who refused to sign them on the ground that he never agreed to sell by the sample Blue M. Subsequently the defendants proposed that a barrel should be shipped and submitted to the plaintiffs as a sample. The plaintiffs refused to consent to this. No molasses was delivered, and this action was brought for damages for non-delivery, the plaintiffs declaring on the sales note as a written contract.

It is stated in the bill of exceptions that the word "Boston" was written into the rough memorandum when the words "sail cargo" and "buyers" were written in. But it is stated that all these words were written in "purple pencil" and from an inspection of the original memorandum which was submitted to us by consent, the only words written are "sail cargo" and "buyers."

The defendants and their witnesses testified that no trade was completed at the meeting between Naisawald, Kaplan and Bernstein, that the memorandum made by Naisawald was not read by him to Kaplan and Bernstein, nor by Naisawald over the telephone to the plaintiffs. That they never agreed to sell by the

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accepted, gauged and coopered. Buyer's option of four Ports, New York, Philadelphia, Baltimore or Boston, giving sellers ample time as to destination. To be shipped by sail cargo.

To be in good cooperage, Molasses or Syrup or Glucose Iron Bound large barrels, gauging 50 to 60 gallons.

Shipments — 2500 barrels in June
3500 barrels August–September,

but this later quantity subject to confirmation by cable from Porto Rico not later than about Monday May 3rd.

Buyers agreeing to advance 35% against Bill of Lading and Insurance Certificates as cargoes are completed, — B. Bernstein endorsing the same: — also being a party as endorser to this contract.

Signed,
L. C. Naisawald & Son.
Guaranteed by B. Bernstein."

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Blue M sample but offered to sell by a sample taken from the cargo later on.

The presiding judge * left it to the jury to determine (1) whether a trade was struck when Kaplan and Naisawald were at Bernstein's office and Naisawald testified that he talked to Christianson over the telephone, or (2) whether the signing of the sales note (which the judge as well as the parties treated as a contract) was within the real or apparent scope of Naisawald's authority.

The plaintiffs had a verdict, and the case is here on exceptions taken by the defendants to the refusal of the judge to give certain instructions asked for by them. No exceptions were taken to the judge's charge.

It is plain that the evidence did not warrant the jury in finding that the defendants had entered into a written contract. The only authority given by the defendants to Naisawald was to act as a broker. Until the terms are agreed upon between the principals a broker is a messenger to carry the offers made one to the other. When a trade has been made by the acceptance of an offer, the broker is authorized by force of his employment as broker to write out and sign the bought and sold notes (duplicate sales notes, as they are sometimes called) necessary to make the trade a binding contract under the statute of frauds, which in this Commonwealth is found in R. L. c. 74, § 5. Where one is employed as a broker he does not thereby get any other or further authority than that just stated, and there is no question in such a case of apparent scope of authority as distinguished from the broker's real authority. See for example *Coddington* v. *Goddard*, 16 Gray, 436, 445; Williston on Sales, § 116. The paper declared on in the case at bar as a contract was really a sale note. Apart from the purple pencil alterations made in the rough memorandum which were incorporated in it, Naisawald's employment as a broker gave him authority to make and sign it, if the plaintiffs' evidence was believed. But Naisawald had no authority from the defendants to make a written contract in their behalf. A written memorandum of an oral agreement is a different thing from a written contract. Where the trade is made by word of mouth a memorandum is a good memorandum of it in case it states the terms previously agreed upon by word of mouth. But in case of a written contract the trade

* *Wait*, J.

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finally struck is the trade stated in the writing, and, because the trade finally struck is the trade stated in the writing, what was previously said by word of mouth is of no consequence. See as to written contracts *Whidden & Co.* v. *Jordan, ante,* 189, 192, 193, where the cases are collected.

In the case at bar there was evidence that Naisawald had authority to make a memorandum of the trade which was made by word of mouth by the defendants and the plaintiffs, if a trade was so made. But there was no evidence that the defendants authorized Naisawald to enter into a written contract in their behalf.

If the first instruction * asked for had been based on the pleadings as well as on the evidence, it could not have been refused. The tenth and eleventh should have been given.

Exceptions sustained.

A. H. Russell, for the defendants.

Lee M. Friedman, for the plaintiffs.

IDELLA J. CARR *vs.* SOL WEISS.

Suffolk. March 26, 1913. — October 20, 1913.

Present: RUGG, C. J., MORTON, LORING, SHELDON, & DE COURCY, JJ.

Release. Assault and Battery. Practice, Civil, Judge's charge.

A release under seal, containing the words "I do hereby release the said W from all claims and demands which I may or might have against him and this release is in full of all demands against the said W every name and nature whether in law or in equity I may have against him to date," covers a claim for damages for an assault and battery; and in an action for assault and battery, where this release is relied on in defense, it is error for the presiding judge to give

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* The instructions requested, above referred to, were as follows:

"1. Upon the whole evidence in the case, the plaintiffs cannot recover and the verdict must be for the defendants."

"10. In order to justify a verdict for the plaintiffs in this action, the jury must find that the defendants gave to Naisawald and Son direct authority to make the alleged contract upon which the plaintiffs rely in the form in which it is submitted to the jury.

"11. If the jury believe from the evidence that Naisawald and Son made any other or different contract from that which they were authorized to do by the defendants, the plaintiffs cannot recover."

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an instruction which can be understood by the jury to mean that unless the language of the release was enlarged by the circumstances under which it was executed the plaintiff's claim is not covered by it.

TORT, with two counts, the first for an assault and battery alleged to have been committed on the plaintiff on June 15, 1910, and the second for the alleged conversion on the same day of a certificate for three hundred shares of a certain stock of the alleged value of $450. Writ in the Municipal Court of the City of Boston dated August 23, 1910.

A supplementary answer of the defendant set up a release under seal of all claims and demands against the defendant.

On appeal to the Superior Court the case was tried before *Hitchcock*, J. The release which was put in evidence is quoted in the opinion, where also certain extrinsic evidence is stated.

At the close of the evidence the defendant asked the judge to make the following rulings:

"1. That upon all the evidence the defendant is entitled to a verdict.

"2. That, as to the release put in evidence by the defendant, the only question in issue is whether or not the plaintiff signed the same, and if the jury find that the plaintiff signed the same the verdict must be for the defendant."

The judge refused to make either of these rulings and gave the instruction which is quoted in the opinion, to which the defendant excepted. The jury returned a verdict for the plaintiff in the sum of $600 on the first count and in the sum of one cent on the second count. The defendant alleged exceptions.

H. Bergson & J. J. O'Connor, for the defendant, submitted a brief.

J. D. Graham, for the plaintiff.

LORING, J. The first count of the declaration was for assault and battery and the second for conversion of shares of stock. The defendant pleaded a release.

At the trial a release under seal in the following words was put in evidence: "I hereby acknowledge to have this day received from Saul Weiss one dollar to me paid by said Weiss, I do hereby release the said Weiss from all claims and demands which I may or might have against him and this release is in full of all demands against the said Weiss every name and nature whether in law or in

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equity I may have against him to date. Witness my hand and seal this 11th day of July, A. D. one thousand nine hundred and ten. Idella J. Carr (Seal)."

The defendant took an exception to the following portion of the judge's charge: "Now, the release — if it was signed — is to be considered with reference to those things that are stated therein, or with reference to the circumstances at the time, with a view of determining what the intention was; if it was intended to include anything outside of what is expressed in the release."

The plaintiff, who had been a tenant of the defendant, owed him for rent but there was a dispute as to the amount. The plaintiff also asserted that the defendant had assaulted her. On July 11, 1910, there was a settlement between the parties at which the plaintiff, the defendant, one Cora Stevens (who succeeded the plaintiff as tenant of the defendant), and another person were present. The plaintiff admitted that she sold her furniture to Cora Stevens on that day, but denied that a bill of sale of it to Stevens dated July 11 and the release set forth above were signed by her. The defendant testified "that he did not strike the plaintiff, but that on several occasions prior to the eleventh day of July, 1910, she had accused him of striking her, and that on said eleventh day of July, 1910, when he was settling matters with her regarding the rent, he told her in view of her accusations that he wanted a full release of all claims that she had against him; that she demurred at first but finally signed the release . . . as well as the bill of sale." There was further evidence that the plaintiff signed both papers.

In that portion of the charge to which exception was taken the presiding judge assumed, or well might have been taken by the jury to have assumed, that unless its meaning was enlarged by the circumstances under which it was executed the release did not cover the plaintiff's alleged claim for assault and battery. This was not correct, and this exception must be sustained without considering further this portion of the charge.

The rulings asked for by the defendant could not have been given. There was evidence that the plaintiff did not sign the release and so the first could not be given. If the release had been signed but not delivered, it would not have been a bar. For that reason the judge was not wrong in refusing to give the defendant's second ruling. *Exceptions sustained.*

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CHARLES CROSIER *vs.* KATE L. CROSIER.

Berkshire. September 29, 1913. — October 20, 1913.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DE COURCY, JJ.

Husband and Wife. Bills and Notes. Trust.

In an action against a widow on a promissory note signed by her during her husband's lifetime, there was evidence that when the note was made the defendant's husband had children by a former wife and that there was property in the defendant's hands which equitably belonged to her husband and which upon his death should form a part of his estate, that, in order to make sure that the children by the former wife should share in this property, the defendant at the request of her husband made the note sued upon payable to the plaintiff, who was her husband's brother and who agreed to act as trustee for such children, and delivered the note to her husband to be kept by him as the agent of the plaintiff, as such trustee. *Held*, that on these facts it could be found that there was a good delivery of the note to the payee and that it was given for a valid consideration.

CONTRACT on a promissory note dated July 29, 1907, for $1,800 payable to the plaintiff on demand without interest, signed by the defendant when she was the wife of Reuben Crosier, who died in 1911 at the age of seventy-eight years. Writ dated May 21, 1912.

In the Superior Court the case was tried before *Crosby*, J. The facts which could have been found upon the evidence are stated in the opinion. At the close of the evidence the defendant asked the judge to make the following rulings:

"1. The plaintiff is not entitled to recover in this case.

"2. If the jury find that the note declared on in this case was executed and delivered by the defendant to her husband, Reuben Crosier, said note was a null and void note.

"3. If the jury find that the present holder of said note when he took the same knew that said note had been executed and delivered by the maker to her husband, Reuben Crosier, then said note in his hands was null and void.

"4. There was no consideration for said note in the hands of the original parties.

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"5. If the jury find that the note was executed and delivered by the defendant to her husband for money claimed by the husband to belong to him, said note was null and void in the hands of said husband, and if after two years the note was transferred by the husband to his son Watson said note still remained null and void and no action can be maintained thereon."

The judge refused to make the rulings requested and gave the jury other instructions on the subjects referred to in the requests.

The judge's charge included the following instructions:

"If the defendant, Mrs. Crosier, executed and delivered the note, the proceeds to be paid to the children of Reuben Crosier at his death as their share of his estate, then there was a valid consideration for the note."

"If the jury find that it was agreed by the defendant and her husband that a note for $1,800 should be given by her to the plaintiff for the benefit of Reuben Crosier's children at his death as their share of their father's estate, and that when said agreement was made that Reuben Crosier was of sound mind, then the defendant is liable on said note if it was delivered to and held by Reuben Crosier for Charles Crosier, the payee, with his knowledge and consent."

"If you find that she didn't have any property in her hands that belonged to him, and that this note was never given or intended by her to be a valid note, and you find that at the time it was given that her husband was of unsound mind, and you find that it was never delivered to Charles Crosier or to anybody representing him, and there was no consideration for it, then if you find that the plaintiff has failed to prove any of these things, either delivery to Charles Crosier or to anybody acting for him, or that the note was without consideration, then the plaintiff is not entitled to recover, unless you find that she agreed to give this note and allow $1,800 to the children of Reuben Crosier regardless of the question whether she had any funds of his in her possession or not."

The jury returned a verdict for the plaintiff in the sum of $1,897.80; and the defendant alleged exceptions to the refusal of the rulings requested and to the portions of the judge's charge which are quoted above.

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The case was submitted on briefs.

J. F. Noxon & M. L. Eisner, for the defendant.

C. P. Niles, J. W. Lewis & F. M. Myers, for the plaintiff.

HAMMOND, J. At the trial the signature of the defendant to the note was admitted. There was evidence from which the jury might have found that the note thus signed was delivered by the defendant to her husband to be kept by him as the agent of the payee, the plaintiff, her husband's brother, and all this with the knowledge and consent of the plaintiff. This was a good delivery to the payee. From the time of such delivery the note belonged to Charles.

Upon the question of consideration it appeared that the plaintiff gave nothing for the note, but there was evidence that there was property in the hands of the defendant belonging in justice and equity to her husband and which in case of his decease should be regarded as a part of his estate and be distributed as such; that the husband was willing that she should hold the property until his decease, but wanted to be sure that, to the amount of $1,800 at least, it should go to his children in certain definite shares named by him; that the defendant, intending to accede to his wishes and for the purpose of securing to his children by his former wife this amount, executed this note to the plaintiff for the benefit of the husband's children, that the plaintiff consented to act as trustee for the children, and that in pursuance of that arrangement the note was executed and delivered as above stated. Upon such findings there was a consideration for the note.

There was evidence therefore of the execution and delivery of the note and of a valid consideration.

The questions of the amount of the consideration and of the mental capacity of the husband were left to the jury upon instructions full, correct and illuminating. We see no error in the action of the court.

Exceptions overruled.

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ROBERT BOSQUET *vs.* WORCESTER CONSOLIDATED STREET RAILWAY COMPANY.

Worcester. September 29, 1913. — October 20, 1913.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DE COURCY, JJ.

Negligence, In use of highway, Street railway. *Bicycle*. *Evidence*, Remoteness. *Practice, Civil*, Exceptions.

It is not negligence as matter of law for a boy ten years of age to ride a bicycle, which has no brake, down a street with a sharp grade which is crossed at its foot by a street railway track.

If a boy ten years of age is riding a bicycle, which has no brake, down a street with a sharp grade which is crossed at its foot by a street railway track, and, when he is about one hundred feet from the track, sees a street railway car coming from an intersecting street, and shouts to the motorman to stop the car, but the car instead of stopping goes faster than before, so that the boy has no chance to cross in front of it and turns to the right hoping to get around the rear end of the car, but fails to clear it and comes into collision with the car and is injured, in an action against the street railway company for his injuries there is evidence on which it could be found that, being placed in sudden peril, he took the course most likely to extricate him from it, and the question of his due care is for the jury.

In an action against a street railway company for injuries to a boy ten years of age, who was riding a bicycle down a street with a sharp grade crossed at its foot by a track of the defendant, when he came into collision with a car of the defendant which came from an intersecting street, if there is evidence on which it could be found that the motorman operating the car might have prevented the accident if he had run the car more slowly or had stopped it or if he had put the plaintiff on his guard by blowing a whistle or ringing a bell when approaching the corner, the question of the defendant's negligence is for the jury.

In an action against a street railway company for injuries to a boy ten years of age who was riding a bicycle down a street with a sharp grade crossed at its foot by a track of the defendant, where the defendant excepted to the exclusion of evidence of what the plaintiff's mother "quite a while before" had said to him about riding down the street, and where the fact that the plaintiff's mother had told him not to ride down the street had appeared by other evidence, it was *held* that the presiding judge well might have excluded the evidence on the ground that it was too remote, and that, at all events, it did not appear that the defendant had been harmed by its exclusion.

MORTON, J. The plaintiff, a boy of ten years of age (twelve at the time of the trial), was riding on his bicycle down Otis Street

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in Fitchburg when he came into collision with a car belonging to the defendant company and received the injuries complained of. Otis Street has a sharp grade. The plaintiff's bicycle had no brake, but he testified that he was "perfectly familiar" with it, and knew how to manage and ride it. He also testified that he was "back pedalling" and "holding back as much as . . . [he] could," and was in the road a little to the left of the centre of the street. Milk Street comes into Otis Street at right angles at the foot of Otis Street, and has also a sharp grade. The defendant's track comes up Milk Street on the left hand side, and, as it reaches the corner, curves into and across Otis Street to the right hand side of Otis Street and continues on up Otis Street on that side. The plaintiff testified that he first saw the car at a point which the evidence showed was a short distance below the corner on Milk Street, when he was, as it appeared, approximately a hundred feet from the corner, and that he shouted to the motorman to stop; that the car did not stop but kept on and went faster than it did before; that he "was thinking of going in front of it right straight across," "and the car started to go faster and I didn't have a chance to get in front of it, so I went to the right of the street as I thought I could get around the end of the car." He also testified that there would have been an opportunity to get in front of the car and go by safely "if the motorman had been going as slow as when I first saw him, but when he started to go faster I didn't have any chance;" and that if he had stopped his bicycle he "would have been thrown right over the handle bar and [in] front of the car." It was in attempting to go to the rear of the car as testified above that the plaintiff came into collision with it. No whistle was blown or gong sounded as the car came up Milk Street. None was needed, of course, so far as the plaintiff was concerned, after he saw the car. The motorman was a witness and his evidence tended in some respects to contradict that of the plaintiff. But manifestly, it seems to us, the testimony of the plaintiff, if believed, would warrant a finding that he was in the exercise of due care. He was in the road where he had the right to be, and finding himself in a position of sudden peril took, as could be found, the course most likely to extricate himself from it. It could not be ruled as matter of law that he was wanting in due care in riding a bicycle without a brake, down the street. The question of his due care was plainly,

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we think, for the jury. See *Robinson* v. *Springfield Street Railway*, 211 Mass. 483; *Robbins* v. *Dartmouth & Westport Street Railway*, 203 Mass. 546; *Green* v. *Haverhill & Amesbury Street Railway*, 193 Mass. 428.

We also think that there was evidence of negligence on the part of the motorman. The corner was or could be found to be a dangerous place. And it was for the jury to say whether the motorman exercised that degree of care which he ought to have exercised in approaching it and in attempting to avoid a collision. He testified that as he got near the corner he "could look across there," and that "there was nothing to obstruct . . . [his] . . . view for about sixty or seventy yards, and there wasn't anything in sight so . . . [he] didn't ring the bell or blow the whistle, or nothing, but kept on going around the curve." The jury may have thought, and if they did we cannot say that they were wrong, that if he had exercised proper care he would have seen the plaintiff and been able to avoid the accident. They also may have thought that the increase of speed, which was in effect admitted by the motorman, was not due, as he said, to the exigency which arose but to a careless running of the car. The jury were not bound to accept his explanation of it, and they may have thought that if he had run the car more slowly or had stopped it, or if the plaintiff had been put on his guard by the blowing of the whistle or the ringing of the bell, the accident might have been prevented.

What was said by the plaintiff's mother to him about riding down the street was "quite a while before," as the witness testified, and may well have been excluded because deemed by the presiding judge * too remote. Moreover, the fact that his mother had told him not to ride down the street was in evidence and would seem to have been all that the defendant was entitled to.

It follows from what we have said that the rulings requested were rightly refused.

Exceptions overruled.

The case was submitted on briefs.

C. C. Milton, J. M. Thayer & F. H. Dewey, for the defendant.

D. I. Walsh, T. L. Walsh & C. B. O'Toole, for the plaintiff.

* *Sanderson*, J. He refused to order a verdict for the defendant, and the jury found for the plaintiff. The defendant alleged exceptions.

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WILLIAM BROUSSEAU *vs.* EDWARD J. CROSS COMPANY.

Worcester. September 29, 1913. — October 20, 1913.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DE COURCY, JJ.

Negligence, Employer's liability.

It is not the duty of the proprietor of a mill who employs an experienced carpenter to work in repairing a portion of the mill building, including an elevator well, to warn such carpenter that a pipe-shaped cylinder in plain sight near the elevator well is a revolving shaft on which his clothing is likely to be caught if he puts his arm around it.

TORT for personal injuries sustained by the plaintiff on October 30, 1911, when employed by the defendant as a carpenter to make repairs in the Worcester Bleach and Dye Works on Fremont Street in Worcester, a building belonging to the defendant which had been injured by fire. Writ dated January 3, 1912.

In the Superior Court the case was tried before *Jenney*, J., who at the close of the plaintiff's evidence, which is described in the opinion, ordered a verdict for the defendant. The plaintiff alleged exceptions.

P. T. Dolan, for the plaintiff.

C. M. Thayer, for the defendant, submitted a brief.

HAMMOND, J. The plaintiff was a carpenter, apparently of considerable experience. He was employed by the defendant to work upon the mill. A part of the work was to repair the damage caused by fire to the main building. In that building was an elevator well. In the course of the work the plaintiff was ordered to help in sheathing the north side of the well. While at work on a staging with a fellow workman in compliance with this order, the plaintiff, facing the well, placed his arm over a revolving shaft which was directly in front of him, drove one nail into a board and started to drive a second nail into the same board, when his clothing was caught in the shaft and he was hurt.

The plaintiff testified that he did not know that the pipe was shafting and that he should have been warned of the danger. Without reciting the evidence in detail it is sufficient to say that there was no evidence of neglect of the defendant, nor of its super-

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intendent. The defendant had no reason to think that the plaintiff, an experienced carpenter engaged in making repairs upon a mill then partially in operation, needed to be told to look out for shafting which was in plain sight, and it owed him no duty to give such warning. *Exceptions overruled.*

KATHERINE SODERLUND *vs.* JOHN HELMAN.
SAME *vs.* SAME.

Worcester. September 29, 1913. — October 20, 1913.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DE COURCY, JJ.

Contract, In writing, Performance and breach, For support. *Damages*, In contract. *Evidence*, Relevancy and materiality. *Practice, Civil*, Exceptions.

It seems, that in an action to recover damages for the alleged breach of a contract in writing in a foreign language, where there is a dispute between the parties as to the correct translation of the contract, the question which translation is the correct one is for the jury.

In an action by a woman for an alleged breach of a contract in writing to furnish her with board and food during her life and also to pay her $10 monthly, testimony of the plaintiff, that she had been in need of food and that she had left the defendant's house because she was afraid of him, is competent as tending to show that the defendant had not furnished the plaintiff with food as he agreed to and that the plaintiff was justified in leaving his house and in not going there for food; *also*, in such action, evidence of the fair market price per week of a woman's board is admissible, upon the question of damages, as tending to show the fair value of the food that the defendant failed to furnish.

In an action by a woman for an alleged breach of a contract in writing to furnish her with board and food during her life and also to pay her $10 monthly, the defendant is not harmed by the admission of the testimony of a deputy sheriff introduced by the plaintiff to show the service upon the defendant of a demand by the plaintiff's attorney for the payment of all money due under the contract, even if as matter of law no such demand was necessary.

In an action by a woman for an alleged breach of a contract in writing to furnish her with board and food during her life and also to pay her $10 monthly, where there is evidence that the plaintiff was under a reasonable apprehension of bodily injury in case she went to the defendant to demand food, it is proper for the presiding judge to instruct the jury that the plaintiff, to recover for a failure to furnish food, must show that she made a demand therefor upon the defendant unless she was under a reasonable apprehension of bodily injury and that such apprehension would excuse her from making the demand, and also to instruct them, that in making such a demand for food the plaintiff was not bound to specify the kind of food she needed, but only to ask to be supplied with food; and it is also correct for the presiding judge to refuse to rule that the plaintiff

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cannot recover unless she made a demand on the defendant, because, on proof of the alleged contract, the plaintiff would be entitled to receive $10 a month from the defendant without any demand.

MORTON, J. These are two actions to recover damages for the breach of a written contract entered into, as alleged in the declaration, by the defendant and one Hanna Helman, his wife, with the plaintiff, whereby they agreed to furnish the plaintiff with board and food for the rest of her life and to pay her in addition $10 monthly during her life. Hanna Helman, the wife, died before the action was brought. There was a verdict for the plaintiff in each case, and the cases are here on exceptions by the defendant to the admission of evidence and to the refusal of the presiding judge* to give certain rulings requested. The cases were tried and have been argued together.

The contract was in Swedish and the parties differed as to the translation and meaning of the language used. According to the translation contended for by the plaintiff the defendant and his wife were to furnish the plaintiff with food for the remainder of her life according to her need and also to pay her $10 monthly. According to the construction contended for by the defendant the plaintiff was to receive from him and his wife board for the remainder of her life on demand according to her need, and this obligation was to be discharged by the payment of $10 monthly to her. It must be assumed that the jury found that the translation contended for by the plaintiff was the correct translation.

The plaintiff was permitted to testify subject to the defendant's exceptions that she had been in need of food, and that she left the defendant's house because she was afraid of him. The evidence was clearly competent as tending to show that the defendant had not furnished the plaintiff with food as he agreed and that the plaintiff was justified in leaving his house and in not going there for food. Evidence which was also introduced, subject to the defendant's exception, of the fair market price per week of a woman's board, was competent on the question of damages as tending to show what was the fair value of the food which the defendant failed to furnish. The testimony of the deputy sheriff of the service by him upon the defendant of a demand by the plaintiff's attorney for the payment of all moneys due the plaintiff under the contract

* *Hall*, J.

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did the defendant no harm, even if as matter of law no demand was necessary.

The first ruling requested, that on all the evidence the plaintiff was not entitled to recover, was rightly refused. There plainly was evidence warranting verdicts for the plaintiff. The second request that the plaintiff could not recover for the food was also rightly refused. The defendant was bound to furnish the plaintiff food according to her need, and if he did not he was liable to her for the fair value of the food not furnished. So much of the third request as was to the effect, that in order to entitle the plaintiff to recover for food she should have made demand therefor on the defendant, was given by the presiding judge with the qualification that the plaintiff would be excused from making such demand if under a reasonable apprehension of bodily injury in case she went to the defendant to make a demand for food. This was correct. There was evidence tending to show that she was under such apprehension. The rest of the ruling asked for to the effect that the demand must be accompanied with appropriate specifications of what food was needed, and unless the jury were satisfied that a demand with such specifications was made the plaintiff could not recover, was rightly refused. While the plaintiff, unless excused by the defendant's conduct, was bound to make a demand for food if in need thereof before the defendant could be said to be in default for failure to furnish it, she was not bound to specify what food she needed. It would have been enough to demand that she be supplied with food. Cases like *Gushee* v. *Eddy*, 11 Gray, 502, relied on by the defendant, are not applicable.

The fourth and last ruling requested was that to enable the plaintiff to recover she must have made a demand on the defendant. This was properly denied. According to evidence introduced by the plaintiff the defendant agreed absolutely and unconditionally to pay the plaintiff $10 monthly. That being so, no demand was necessary before bringing suit although, as already observed, one seems to have been made. *Andrews* v. *Frye*, 104 Mass. 234. 9 Am. & Eng. Encyc. of Law, (2d ed.) 199.

Exceptions overruled.

The cases were submitted on briefs.

J. G. Annala, for the defendant.

P. F. Ward, for the plaintiff.

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RUFUS B. DODGE, administrator, *vs.* FLORENCE E. T. BENNETT & another.

Worcester. September 29, 1913. — October 20, 1913.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DE COURCY, JJ.

Devise and Legacy, Vested remainder, Rule against perpetuities.

Where, by the provisions of a will, real estate and personal property are given to the testator's widow and an adopted daughter for their lives and, at the death of the survivor of them, to the children of the adopted daughter for their lives and the life of the survivor of them and, at the death of the survivor of the "wife, daughter and the children of" the daughter, to a church, the church receives a vested remainder at the death of the testator, and the gift therefore is not void as in violation of the rule against perpetuities, although the estate of children of the adopted daughter might postpone beyond a period twenty-one years after a life or lives in being the vesting of the estate in possession in the church.

BILL IN EQUITY, filed in the Probate Court on June 20, 1913, by the administrator with the will annexed of the estate not already administered of Thomas Talbot, late of Worcester, for instructions.

The will, after provisions for the payment of debts and funeral expenses, provided as follows:

"1st. To my wife, Harriet Maria Talbot and my adopted daughter Florence Evelyn Talbot jointly the use, income and improvement of all my estate real and personal for their lives.

"2nd. At the decease of the survivor of my wife and daughter, I give and bequeath the use income and improvement of my estate real and personal to the children of my adopted daughter Florence Evelyn Talbot for their lives or the life of the survivor of such children.

"3rd. At the decease of the survivor of my wife daughter and the children of my daughter, I give devise and bequeath the remainder of my estate and all my estate real and personal to the First Universalist Church of Worcester."

It appeared that the testator's widow had died and that Florence Evelyn Talbot had become by marriage, Florence Evelyn Talbot Bennett, but had had no children born to her. The plain-

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tiff held as administrator $805.53, and he asked for instructions as to the following matters:

"1. Is the bequest and devise to the said First Universalist Church of Worcester, set out in the third paragraph of said will, void for remoteness?

"2. Is the said Florence Evelyn Talbot Bennett, because of the non-birth of any children to her, entitled to said personal estate and to said real estate free of any limitations attempted to be made by the said Thomas Talbot in said will, either as a legatee and devisee named in said will, or as the only heir at law of the said Thomas Talbot?"

It was assumed either that the First Universalist Church of Worcester was incorporated or that its officers constituted a corporation under R. L. c. 37, § 1.

By order of *Chamberlain*, J., a decree was entered in the Probate Court, instructing the plaintiff that it was his duty "to transfer the personal estate remaining in his hands upon the settlement of his final account as such administrator to a duly qualified trustee to be held by him for the benefit of said respondents, Florence E. Bennett, her children, if any survive her, and the First Universalist Church, in accordance with the provisions of said will," and that the remainder given to the church was not void for remoteness; and declaring that "it cannot now be determined judicially, that said Florence E. Bennett will not have children who may survive her."

On appeal from the decree by Florence Evelyn Talbot Bennett, the case was reserved by *Rugg*, C. J., for determination by the full court.

The case was submitted on briefs.

A. S. Houghton, for Mrs. Bennett.

H. F. Harris, for the First Universalist Church of Worcester.

SHELDON, J. Under the will of Thomas Talbot, all his property real and personal, after certain life estates provided for, was devised and bequeathed to the First Universalist Church of Worcester. This gave to that church a vested remainder. *Bosworth* v. *Stockbridge*, 189 Mass. 266. Being vested in interest upon the death of the testator, it does not become invalid merely because the right to actual possession and enjoyment may be postponed to a time beyond that limited by the rule against perpetuities. *Gray*

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v. *Whittemore*, 192 Mass. 367, 373, 374. There is no ground upon which the final limitation to the church can be declared void. There could be no contention to the contrary unless some of the prior limitations to tenants for life are invalid, even if such a contention could be made at all. See Gray's Rule Against Perpetuities, §§ 251 *et seq.*, and the cases there collected. These prior limitations are, first, that a life estate is given to the testator's widow and his adopted daughter jointly. This of course was valid. Upon the death of both of these beneficiaries, the property by the next limitation was to go to the children of Mrs. Bennett for their lives and the life of the survivor. As this limitation must take effect, if at all, upon the death of Mrs. Bennett, its validity cannot be doubted. These last life estates, if they come into existence, may last beyond the period limited by the rule, of a life or lives in being and twenty-one years thereafter reckoned from the death of the testator. This however would not avoid them after they once had taken effect. *Gray* v. *Whittemore*, 192 Mass. 367, 372. If Mrs. Bennett should have no children, and so if these secondary life estates never should come into being, this would simply accelerate the coming of the church into possession of the estate devised to it in remainder. *Dow* v. *Doyle*, 103 Mass 489.

It cannot now be said that Mrs. Bennett may not have children surviving her.

As no other objections to the decree of the Probate Court have been taken, that decree must be affirmed.

So ordered.

LYMAN A. BOWKER & others *vs.* ADELAIDE J. TORREY & another.

Suffolk. January 22, 1913. — October 21, 1913.

Present: RUGG, C. J., MORTON, LORING, BRALEY, & SHELDON, JJ.

Limitations, Statute of, In actions against executor or administrator. *Executor and Administrator. Equity Jurisdiction,* Mistake. *Equity Pleading and Practice,* Parties.

In a suit in equity by a member of a partnership, which had been composed of three persons, against the widow of one of the three partners, personally and as the executrix of his will under which she was the sole legatee and devisee, alleging that upon an accounting, by reason of a mutual mistake of fact made by all the

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parties through their common agent, the defendant received much more than her share of the partnership assets, and seeking to recover such excess from her personally, R. L. c. 141, § 9, limiting actions against an executor or administrator, is no defense, because the relief is not sought against the defendant as executrix, although an incidental result of granting it will be to diminish the estate of the defendant's testator. Upon the question, whether such a suit can be maintained without joining the third member of the partnership either as a plaintiff or a defendant, no opinion was expressed.

SHELDON, J. Material amendments have been made in the plaintiffs' bill since our decision reported in 211 Mass. 282. As now presented, the plaintiffs put their claim against Mrs. Torrey upon the ground that through a mutual mistake of all the parties made by their common agent she has received out of the assets of the former firm of Bowker, Torrey and Company a much larger amount than should have come to her as the representative of Charles Torrey, a deceased partner, and that the plaintiffs as the representatives of Edwin Bowker, another deceased partner, and Franklin Torrey the third partner in his own right, have each received a correspondingly smaller amount than they respectively were entitled to have. Disregarding the cash contribution of $100,000 made in equal shares by the holders of the three interests toward the payment of the debts of the firm, the plaintiffs assert that the firm assets consisted of certain personal property and of certain described parcels of real estate, the legal title to which had been put into the names of the three partners as tenants in common, but which were really held by them as firm assets and upon a resulting trust in favor of the firm. A partnership account was taken, from which it appeared that the estate of Charles Torrey was entitled to receive somewhat more than eleven per cent, Franklin Torrey nearly forty per cent, and the estate of Edwin Bowker, represented by the plaintiffs, nearly forty-nine per cent of all the partnership property. It was intended to convey all the firm assets to a new corporation which was formed, and to divide the capital stock of that corporation among the three parties in interest in the proportions stated, which, according to the accounting that had been made, would have brought about a correct division of the firm assets. The bill charges, however, that there were errors and mistakes in this account, and that the share of Charles Torrey's estate should have been found to be less, and the shares of Franklin Torrey and of Edwin Bowker's estate corre-

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spondingly greater, than this account showed. But only the personal assets, according to the bill, were conveyed to the corporation; and by another and grosser mistake of the common agent of the parties the real estate was left to be enjoyed by the several partners or their respective representatives according to their legal titles. The result was, as the bill avers, that Mrs. Torrey received one-third of the real estate instead of about eleven per cent thereof, being a very much larger amount than she should have had, while Franklin Torrey, the surviving partner, and the plaintiffs in the right of Edwin Bowker, the other deceased partner, were left with much less than they severally were entitled to receive. This all was done after the decease of Charles Torrey; and Mrs. Torrey, being the executrix of his will and the sole legatee and devisee thereunder, acquired the allotted part of the capital stock of the corporation and one undivided third part of the real estate. The bill seeks to correct the errors, to have Mrs. Torrey ordered to pay to the plaintiffs the amount which she has gained at their expense, and to enforce a trust upon her share of the real estate for such payment.

The only question now before us is whether the statute of limitations of suits against executors and administrators (R. L. c. 141, § 9) constitutes a bar to the suit.

The bill is not brought and relief is not sought against the estate of Charles Torrey, but against Mrs. Torrey individually. The plaintiffs ask for decrees against her, not against the estate of her testator in her hands. That the result of the establishment of their claim may be to diminish the assets of that estate in her hands or the amount coming to her as legatee and devisee of that estate, is not material. *Ames* v. *Jackson*, 115 Mass. 508, 510. The liability was created by her act, however innocently done, in receiving property to which she was not equitably entitled. See the notes to *Brown* v. *Quinton*, 18 Ann. Cas. 292, and to *Western Newspaper Union* v. *Thurmond*, 23 Ann. Cas. 728. Manifestly this action, if it can be maintained at all, could be maintained against her for the relief sought, though another person had been the executor of her husband's will, if the property in question actually had come to her hands. The liability to the plaintiffs set out in the bill did not exist in Charles Torrey's lifetime; it arose only when, by a common mistake, she received property to which

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Franklin Torrey and the plaintiffs were equitably entitled. It follows that the plea of the special statute of limitations sets out no defense to this suit; and the order adjudging the plea sufficient and the decree dismissing the bill must both be reversed.*

We add, to avoid any misconception, that we have not considered the question whether any relief can be given to the plaintiffs without joining Franklin Torrey either as a plaintiff or as a defendant, and without bringing all the property in question into hotchpot, instead of seeking to hold merely the undivided interest of Mrs. Torrey in that property. Upon these questions we express no opinion.

Order and decree reversed.

J. Noble, for the plaintiffs.

G. W. Anderson, for the defendants.

ELECTRELLE COMPANY *vs.* JAMES J. MAGUIRE.

Suffolk. March 27, 1913. — October 21, 1913.

Present: RUGG, C. J., MORTON, LORING, SHELDON, & DE COURCY, JJ.

Res Judicata. Lease of Chattel.

Under a lease of a chattel for a stipulated rent of a certain sum of money a month payable in advance, the lessor can bring an action for each unpaid monthly instalment of rent as it falls due, and if, after he has brought an action for the rent due up to the date of the writ and before such action has come to trial, he brings a suit of equitable replevin in which he claims rent that fell due after the previous action was brought and obtains a decree ordering the defendant to deliver the chattel to him and to pay him the rent claimed in that suit, the decree is no bar to the first action brought for the rent previously due.

LORING, J. This is an action for rent of an electrical piano player, payable in advance at the rate of $25 a month for the twenty-three months beginning December 1, 1908, and ending October 1, 1910. The plaintiff credited the defendant with payments made during this period amounting to $242.85, making the net balance due (disregarding interest) $332.15.

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* The order and decree were made by *Hammond,* J. The plaintiffs appealed.

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The action came on to be tried in February, 1912, before a single judge* sitting without a jury. At the trial the plaintiff put in evidence the record in a suit of equitable replevin brought by the same plaintiff against the same defendant some five months after the bringing of the action now before us. By a final decree made in that suit some four months before the trial was had in this action, the defendant had been ordered (1) to deliver to the plaintiff the piano player, and (2) to "pay to the plaintiff as and for the rent specified in the fourth paragraph of the bill and interest thereon the sum of one hundred and thirty dollars and fifty-nine cents ($139.59) and that execution issue therefor." The fourth paragraph of the bill in equity, so far as it deals with rent of the piano player, was in these words: "The defendant, though requested, has not paid the rent therefor for certain months prior to November, 1910, for which the plaintiff has brought suit, and has not paid the rent for the months of November and December, 1910, and January, February and March, 1911."

The judge made the following findings in the action now before us: "I find that 'rent therefor for certain months prior to November, 1910, for which plaintiff has brought suit' is not the rent specified in the fourth paragraph, and that 'the rent for the months of November and December, 1910, and January, February and March, 1911,' is the rent specified and that it is the latter period, and no other that the decree covers." "I find for the plaintiff in the sum of $332.15 with interest from the date of the writ." †

The rent being payable monthly, the plaintiff had a right to bring an action for each unpaid monthly instalment as it fell due. In the action now before us the plaintiff could recover for rent due for the twenty-three months next before October 19, 1910, but not for rent thereafter falling due. After bringing this action he had a right to bring a further action or actions to recover unpaid monthly instalments thereafter falling due. If he did bring subsequent actions for subsequent rents and recovered judgment in the subsequent action for the subsequent rents before the first action came on for trial, he was not thereby prevented from recovering a later judgment in the earlier action for the earlier rent.

Of course the plaintiff could not recover in this the earlier ac-

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* *Lawton*, J. † The defendant alleged exceptions.

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tion for the earlier rents if he included the earlier as well as the subsequent rents in the subsequent bill in equity on which he has had a decree. But it is manifest that the plaintiff in the case at bar intended to exclude from the subsequent bill in equity the rents (covered by this earlier action) for the months prior to November 1, 1910, by inserting in the fourth paragraph of the subsequent bill in equity the allegation that he had "brought suit" for the rent for those months.

Exceptions overruled.

James J. McCarthy, for the defendant.

R. D. Swaim, (*J. M. Maguire* with him,) for the plaintiff.

J. BRAINARD CLARKE *vs.* EDGAR H. PIERCE, executor.

Berkshire. September 9, 1913. — October 21, 1913.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DE COURCY, JJ.

Conflict of Laws. Limitations, Statute of. Bills and Notes.

The statute of limitations being a matter of remedy, the question whether an action is barred by it is to be determined by the law of the forum.

A promissory note under seal, although the seal is unnecessary for its validity, is a contract under seal within the meaning of the provision of the statute of limitations contained in R. L. c. 202, § 1, and an action can be brought on it at any time within twenty years after the cause of action accrues.

A promissory note under seal, although it is a contract under seal within the meaning of the statute of limitations, is none the less a promissory note and properly is declared upon as such.

MORTON, J. This is an action to recover upon a promissory note signed by the defendant's testator payable to the plaintiff or order. The note is under seal. There was a verdict for the plaintiff and the case is here on exceptions by the defendant to the refusal of the presiding judge,* to make certain rulings that were requested and to the charge so far as inconsistent with such rulings.

The note was dated "Chicago, Ill. Dec. 4th, 1894," and there was evidence tending to show that it was signed, sealed and delivered by the maker to the plaintiff in Chicago on the day of its date.

* *Sanderson*, J.

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There was also evidence tending to show that William H. Clarke, the maker, died in Pittsfield January 26, 1911, and that he had been a resident of and a taxpayer in Pittsfield continuously since 1902. There was nothing to show what, if material, the law of Illinois was.

The principal question relates to the statute of limitations which is a matter of remedy and is governed by the law of the forum. *Bulger* v. *Roche*, 11 Pick. 36. By the law of this State actions on contracts under seal are limited to twenty years next after the cause of action accrues. R. L. c. 202, § 1. In order to avoid the effect of this provision the defendant contends that the seal should be treated as surplusage, or if not, that the note still remains and is to be considered as a simple contract, in which case the action is limited to six years next after the cause of action accrues. R. L. c. 202, § 2.

There is no doubt that where a seal is not required or where it has no effect it may be disregarded. *Sherman* v. *Fitch*, 98 Mass. 59. *Blanchard* v. *Blackstone*, 102 Mass. 343. A negotiable promissory note does not require a seal but there is nothing in its character which prevents the parties from affixing a seal to it, if they choose to do so, and thereby rendering it effectual as a contract under seal. It is manifest that the parties intended the note in the present case to be under seal. It concludes "Given under my hand and seal this 4th day of Dec. 1894." There is nothing in the statute which excludes a note under seal from its operation. The provision in regard to witnessed notes has no bearing on the question whether a note under seal is a contract under seal within the meaning of the statute. It relates to an entirely different kind of note and cannot be construed as excluding notes under seal from the operation of the twenty year limitation. If the effect of regarding the note as a contract under seal is to extend the period of limitation from six years to twenty, it cannot be said that the seal is of no consequence and may therefore be disregarded. What effect, but for the statute, the seal would have had upon the negotiability of the note in this State it is not necessary to consider. That question was explicitly left open in *Richards* v. *Barlow*, 140 Mass. 218, 220. It is now expressly provided by statute that the validity and negotiability of an instrument shall not be affected by the fact, amongst others, that it bears a seal. R. L. c. 73, § 23,

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cl. 4. It had long been provided by statute in this State before the passage of the negotiable instruments act, so called, that a bond or other obligation under seal issued by a corporation and purporting to be payable to order or the bearer should be negotiable in the same manner and to the same extent as a promissory note, (Pub. Sts. c. 77, § 4; Gen. Sts. c. 53, § 6; St. 1852, c. 76,) and hence the question which has arisen in other jurisdictions as to the negotiability of such instruments has not come up for discussion here. *Mercer County* v. *Hacket*, 1 Wall. 83. It follows from what has been said that the note in suit must be regarded as a contract under seal within the meaning of the provision in the statute of limitations in regard to such contracts, and that the action is not barred; and so is the weight of authority. *Garner* v. *Toney*, 107 Ala. 352. *Simpson* v. *Brown-Desnoyers Shoe Co.* 70 Ark. 598. *Barnes* v. *Walker*, 115 Ga. 108. *Rawson* v. *Davidson*, 49 Mich. 607. *Munro* v. *Hill*, 25 S. C. 476. *Brown* v. *Jordhal*, 32 Minn. 135. *Welfare* v. *Thompson*, 83 N. C. 276. *Biery* v. *Haines*, 5 Whart. 563. 25 Cyc. 1035. Wood on Limitations, § 29. 1 Dan. Neg. Instr. (3d ed.) §§ 31, 32.

The instrument was rightly declared on as a promissory note.

The rulings requested were rightly refused.

Exceptions overruled.

C. P. Niles, (*J. W. Lewis & F. M. Myers* with him,) for the defendant.

J. F. Noxon & M. L. Eisner, for the plaintiff, were not called upon.

OWEN E. SCANLON, administrator, *vs.* BERKSHIRE STREET RAILWAY COMPANY.

MARTIN E. EAGAN *vs.* SAME.

Berkshire. September 9, 1913. — October 21, 1913.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DE COURCY, JJ.

Negligence, In use of highway, Street railway. *Evidence*, Common knowledge.

A traveller on a public way, either on foot or driving in a vehicle, while he is required at all times to exercise reasonable prudence, has a right to rely to a certain extent on the assumption that a motorman operating a street railway

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car when approaching the crossing of an intersecting street will take ordinary precautions to avoid a collision.

If an experienced teamster, who is driving a pair of horses attached to a cart from an intersecting street and is about to cross a much travelled street where street cars are operated, as he passes over the cross walk with his team moving slowly, looks toward an approaching car almost four hundred feet distant, and then does not look again until just before the car, which is being driven at an excessive and unlawful rate of speed, strikes the cart after the horses have nearly if not quite gone over the track, he is not negligent as matter of law, and, in an action against the street railway company for causing his death, it is for the jury to say whether he should have looked again or whether he properly could rely on the expectation that the speed of the car would be slackened.

In an action against a street railway company for causing the death of the plaintiff's intestate, who was driving a pair of horses attached to a cart from an intersecting street across a track of the defendant, when his cart was struck by a car moving at an excessive rate of speed, the jury from their experience and common knowledge may infer that the intestate did not intend deliberately to expose himself and his employer's property to the chance of injury by attempting to pass in front of an approaching car when it was so near that a collision appeared to be unavoidable.

TWO ACTIONS OF TORT, the first action by the administrator of the estate of John Scanlon for causing the death of the plaintiff's intestate by a collision of a street railway car, operated by servants of the defendant, with a cart in which the plaintiff's intestate was driving a pair of horses from West Housatonic Street in Pittsfield into South Street in that city on December 11, 1911; and the second action by the owner of the horses and cart for injury to his property by the same collision. Writs dated January 18 and February 17, 1912.

In the Superior Court the cases were tried together before *Sanderson*, J. The facts which could have been found upon the evidence are stated in the opinion. At the close of the evidence the defendant asked the judge to order a verdict for the defendant in each of the cases. The judge refused to do this, and submitted the cases to the jury, who returned a verdict for the plaintiff in the first case in the sum of $3,500 and a verdict for the plaintiff in the second case in the sum of $300. The defendant alleged exceptions, including an exception to the admission of certain evidence which was waived.

J. B. Ely, for the defendant.

C. H. Wright, for the plaintiffs.

BRALEY, J. The exceptions to the admission of evidence having been waived, the defendant's sole contention is, that there was

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no proof of the decedent's due care. It appears that after the accident he never recovered consciousness, and his conduct must be determined from the recollection of eyewitnesses and the attendant circumstances. If the facts which the testimony would warrant the jury in finding are equally consistent with an inference of his due care, or of his negligence, nothing remains except mere conjecture, and the verdicts cannot be sustained. *French* v. *Sabin*, 202 Mass. 240. *Taylor* v. *Pierce Bros.* 213 Mass. 247.

A traveller on a public way, whether on foot or driving a team as in the case at bar, while required to act with reasonable prudence, has the right to rely to some extent on the assumption, that a motorman operating an electric car will take ordinary precautions at intersecting streets to avoid collisions. *Hennessey* v. *Taylor*, 189 Mass. 583. *Horsman* v. *Brockton & Plymouth Street Railway*, 205 Mass. 519. *Nelson* v. *Old Colony Street Railway*, 208 Mass. 159. *Foster* v. *Boston Elevated Railway*, 214 Mass. 61.

The jury could have found not only that the decedent was a careful teamster of large experience thoroughly familiar with the streets of the city, the regulation of traffic, and the operation of cars therein, but, as he came through the cross street with the team moving slowly, and passed over the cross walk, the car, from which the motorman had an unobstructed view of the track for a thousand feet, was being driven in violation of a city ordinance at an excessive rate of speed. As the decedent drove over the cross walk one of the plaintiff's witnesses saw him look toward the approaching car, which then was not quite four hundred feet distant, although he did not look again until shortly before the collision, when the car struck the wagon after the horses had nearly if not quite gone over the track. It was a question for the jury under these conditions whether the decedent, who was not called upon to anticipate an unreasonable or unlawful rate of speed, saw the car when he first looked, and, judged by the conduct of the ordinarily prudent man similarly situated, was justified in proceeding, or whether he should have looked again, as well as whether he properly could rely upon the speed of the car being slackened in a street shown by the evidence to have been subjected constantly to a large amount of public travel. *Jeddrey* v. *Boston & Northern Street Railway*, 198 Mass. 232. *Horsman* v. *Brockton & Plymouth Street Railway*, 205 Mass. 519. *O'Brien* v. *Lexington &*

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Boston Street Railway, 205 Mass. 182, 184, 185. *Farris* v. *Boston Elevated Railway*, 210 Mass. 585.

The jury furthermore from their common experience properly could infer, under the circumstances, that the decedent did not intend deliberately to expose himself or his employer's property to the chance of injury by attempting to pass in front of an oncoming car, if its proximity was such that a collision appeared to be unavoidable. *Prince* v. *Lowell Electric Light Corp.* 201 Mass. 276, 281, 282, and cases cited. *Berry* v. *Newton & Boston Street Railway*, 209 Mass. 100, 103.

The ruling requested was properly refused, and the exceptions must be overruled.

So ordered.

WILLIAM H. ROCKWELL & another, executors, *vs.* WILLIAM T. FURNESS.

Berkshire. September 9, 1913. — October 21, 1913.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DE COURCY, JJ.

Survival of Actions. Executor and Administrator. Pleading, Civil, Answer.

An executor cannot maintain an action of tort for false representations made to his testator who relied upon them to his loss, a loss thus incurred not being "damage to real or personal property" for which an action survives under R. L. c. 171, § 1.

The expenditure of money by an executor upon the prosecution of an action for an alleged wrong done to his testator under the mistaken belief that the right of action survives under R. L. c. 171, § 1, when it is not within that statute, has no effect to revive the extinct cause of action.

In an action of tort by an executor for an alleged wrong done to his testator, the defense that the right of action died with the testator and did not survive to the executor under R. L. c. 171, § 1, is available under an answer which contains only a general denial, because, if the action did not survive, the plaintiff can show no right to recover.

TORT by the executors of the will of Rosella A. Rockwell for false representations alleged to have been made to the agent of the plaintiffs' testatrix and on which the testatrix was alleged to have relied to her loss and damage as stated in the opinion. Writ dated September 20, 1910.

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The answer was a general denial.

In the Superior Court the case was tried before *Sanderson*, J. At the close of the plaintiffs' evidence the judge ordered a verdict for the defendant; and the plaintiffs alleged exceptions, containing a stipulation of the parties that, if upon the competent evidence the judge should have submitted the case to the jury, judgment should be entered for the plaintiffs in the sum of $1,850.

M. B. Warner, for the plaintiffs.

W. L. Came, for the defendant.

SHELDON, J. The plaintiffs seek to recover on the ground that the defendant falsely represented to Rosella A. Rockwell, their testatrix, or rather to her agent, in her lifetime, that he had authority to settle her claims against certain insurance companies for the loss by fire of her property upon which those companies had issued to her policies of insurance against fire, or upon failure to make such settlements with her that he had authority to sign a "reference paper" in the name of each of the companies. They allege that their testatrix and her agent, believing these representations and relying thereon, failed to notify the insurance companies of the loss that had occurred, and so lost her remedy against the companies. *Rockwell* v. *Hamburg-Bremen Fire Ins. Co.* 212 Mass. 318.

If we assume everything else in favor of the plaintiffs, it yet remains true that the remedy of the testatrix for the tort of the defendant could be enforced only in her lifetime; it did not survive her death. R. L. c. 171, § 1. As was said in *Jenks* v. *Hoag*, 179 Mass. 583, 586, "It has been decided repeatedly that 'a mere fraud or cheat by which one sustains a pecuniary loss cannot be regarded as a damage done to personal estate.' *Leggate* v. *Moulton*, 115 Mass. 552, and cases there cited. See also *Cutter* v. *Hamlen*, 147 Mass. 471. The statute was intended to give a remedy which should survive only for injuries of a specific character 'to real or personal estate.' " There is nothing to help the plaintiffs in *Parker* v. *Simpson*, 180 Mass. 334, 343; *Von Arnim* v. *American Tube Works*, 188 Mass. 515, 519, 520; *Batty* v. *Greene*, 206 Mass. 561, 564, *et seq.*; or *Lovejoy* v. *Bailey*, 214 Mass. 134, 154. See also *Dixon* v. *Amerman*, 181 Mass. 430.

If the plaintiffs since the decease of their testatrix have, in

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reliance upon the same representations of the defendant, spent money in the prosecution either of this action or of the actions brought by her against the insurance companies, this could not revive the lapsed cause of action. They were bound to know that it did not survive.

Nor can we doubt that this objection was available to the defendant without having been set up in his answer. It was not matter in avoidance, or any independent substantive matter of defense, but a denial of any right of action. The record showed that the court had no jurisdiction of the case; and it followed that the plaintiffs' evidence showed no right of action, nothing that the defendant was called upon to answer. *Hey* v. *Prime*, 197 Mass. 474, 475. *Keating* v. *Boston Elevated Railway*, 209 Mass. 278, 281, 282.

Exceptions overruled.

GEORGE S. RAYMOND *vs.* RAY L. PHIPPS.

Franklin. September 16, 1913. — October 21, 1913.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DE COURCY, JJ.

Lord's Day. Pleading, Civil, Answer. *Contract,* Validity. *Frauds, Statute of. Practice, Civil,* Conduct of trial: rulings and instructions. *Damages,* In contract. *Evidence,* Relevancy and materiality.

In an action of contract, the defense, that the contract was invalid because it was made on the Lord's day, cannot be availed of if it is not set up in the answer.

At the trial of an action for a breach of a contract to purchase milk from the plaintiff for a year, the evidence of the plaintiff tended to show that in a conversation the defendant agreed to take milk from the plaintiff for a year, no mention being made as to when the year should begin. The defendant asked for a ruling that, if the contract was for one year and the year did not include the day on which it was made, the plaintiff could not recover in the absence of a memorandum in writing. The judge refused to give that ruling, but instructed the jury in substance that, if the agreement was as the plaintiff contended that it was, that would be an agreement that could be performed within one year from its making; but that, if the agreement was that the defendant was to take the milk for one year from some future date, then the agreement could not be performed within a year from the time it was made, and the statute of frauds would be a defense. *Held,* that the instruction covered all that the defendant asked for, so that no harm was done by the refusal to give the ruling in the form in which it was requested.

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In an action for the breach of a contract to purchase milk from the plaintiff for a year, where it appears that the action was brought within three and one half months after the contract was made, the measure of damages should include such profits as the plaintiff would have realized from the contract if it had been fully performed and which the defendant's breach of the contract prevented him from realizing, and evidence of a price for which the plaintiff, after the refusal of the defendant to take his milk further, sold it to another person, is admissible for the purpose of showing the profits which the plaintiff would have realized from the complete performance of the contract by the defendant and the loss which he sustained from the breach of that contract; and, in the absence of anything to the contrary, the jury is warranted in assuming that the price received from such other dealer was the best price obtainable for the milk during the period in question.

At the trial of an action for the breach of a contract to purchase milk from the plaintiff for a year, where it does not appear that the parties made any agreement as to the ownership of the milk, it is not material whether the plaintiff had any financial interest in the milk that he was shipping to the defendant, and evidence on that question is not admissible; nor, in the absence of any contention by the defendant that the contract was made by the plaintiff as a member of a partnership and for the partnership's benefit, is evidence admissible to show that, at the time of the making of the contract, the plaintiff and a third person were "in partnership."

CONTRACT, by a farmer against a milk dealer, upon an alleged oral agreement made on or about November 1, 1911, whereby the defendant agreed to "purchase the plaintiff's milk" for the period of one year at thirty-four cents per can, the plaintiff to furnish thirty of the cans necessary for the transportation of the milk. The declaration alleged that the plaintiff furnished the cans and shipped the milk to the defendant until January 9, 1912, when the defendant refused to receive any more milk from the plaintiff. Writ dated February 13, 1912.

The answer contained a general denial and an allegation of payment, and set up the statute of frauds, alleging that the contract was one not to be performed within one year. There was no allegation that the contract was illegal because made on the Lord's day.

In the Superior Court the case was tried before *Hitchcock*, J. The material facts are stated in the opinion. There was a verdict for the plaintiff in the sum of $175; and the defendant alleged exceptions.

H. Sherman, for the defendant.

H. A. Weymoth, (*W. A. Davenport* with him,) for the plaintiff.

MORTON, J. This is an action to recover damages for the

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breach by the defendant of an alleged oral contract for the sale of milk by the plaintiff to him for one year. There was a verdict for the plaintiff, and the case is here on exceptions by the defendant to the refusal of the presiding judge to give certain rulings and to the admission and exclusion of evidence.

The plaintiff is a farmer in Charlemont and the defendant a milk dealer in Boston. During the late summer of 1911 the plaintiff began shipping milk to the defendant at thirty-two cents per can. In the fall of 1911 the defendant and his sister drove to the plaintiff's house and a conversation took place between the parties. It is upon this conversation that the plaintiff bases this action. The plaintiff testified that the defendant told him that other parties were furnishing a part of the cans necessary for carrying on the business, and asked him to do the same; and that he told the defendant that he would furnish cans as requested if the defendant would agree to take his milk for a year at thirty-four cents a can. Down to this point the parties agree. The plaintiff further testified that the defendant agreed to take his milk for a year. The defendant testified that he did not so agree, and that the plaintiff did not let him know until the next day that he would furnish the cans. This conversation took place, according to the plaintiff's recollection, in November, though he would not say positively. The defendant introduced evidence tending to show that it took place in the afternoon of Sunday, October 22. There was other evidence bearing on the question when the contract took effect, but it is not necessary to refer to it more particularly now.

The first ruling requested was in substance that if the jury should find that the contract was made on the Lord's day the plaintiff could not recover. This was rightly refused. The defense of illegality was not set up in the answer and was not therefore open to the defendant. *O'Brien* v. *Shea*, 208 Mass. 528. *Silver* v. *Graves*, 210 Mass. 26, 31.

The second ruling requested was that if the contract was for one year and the year did not include the day on which it was made the plaintiff could not recover in the absence of a written memorandum. This was given in substance though not in form. The presiding judge was not obliged to use the exact language of the request. The jury were instructed as follows: "If the agree-

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ment was, as claimed by the plaintiff, that the defendant would take the milk for one year, and there was nothing further said about it, that would be an agreement which could be performed within a year from the making thereof. If the agreement was that he was to take the milk for a year from some future date, then the agreement could not be performed within a year from the time that the agreement was made, and the statute of frauds would be a defense in such a case as that." The plaintiff testified that the defendant agreed to take the milk for a year on the day that the conversation took place, and we do not see how the jury could have failed to understand from the instruction that if the year included the day on which the agreement was made the plaintiff could recover, but if it did not the statute of frauds would be a defense and the plaintiff could not recover. So understood, the instruction covered all that the defendant asked and no harm was done by the refusal to give it in the form in which it was requested. *Sanborn* v. *Fireman's Ins. Co.* 16 Gray, 448.

The measure of damages included the profits which the plaintiff would have realized from the contract if it had been fully performed. *Fox* v. *Harding*, 7 Cush. 516, 522. In the absence of anything to the contrary it is to be presumed that the price for which the plaintiff sold the milk to Hood after the defendant had refused to take it, was the best price obtainable, and it was admissible for the purpose of showing the profits which the plaintiff would have realized and the loss which he sustained.

The question whether the plaintiff owned or had any financial interest in the milk he was shipping to the defendant was properly excluded. Whether the plaintiff owned or had any financial interest in the milk had nothing to do with the contract or with the defendant's breach of it. We also think, that, as the case stands, the question to the witness Legate, "Were Mr. Raymond [the plaintiff] and your son in partnership at this time?" was properly excluded. There was no offer to show that the contract in suit was a partnership transaction and that in making the contract the plaintiff was acting for and on behalf of the firm, in which case the question would have been admissible; *Baker* v. *Jewell*, 6 Mass. 460; *Converse* v. *Symmes*, 10 Mass. 377; *Halliday* v. *Doggett*, 6 Pick. 359; *Fay* v. *Duggan*, 135 Mass. 242; 15 Encyc. of Pl. & Pr. 566, and cases cited; but the question, as we construe

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it, was simply whether a partnership existed between the plaintiff and the son of the witness. So interpreted, the question was plainly incompetent and immaterial.

Exceptions overruled.

ERVING M. HOLDEN *vs.* RICHARD A. McGILLICUDDY.

Franklin. September 16, 1913. — October 21, 1913.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DE COURCY, JJ.

Evidence, Foreign law, Presumptions and burden of proof. *Conflict of Laws. Automobile*, License of operator, Registration of car. *Negligence*, In use of highway, Trespasser.

Where, at the trial of an action of tort for damage to an automobile alleged to have resulted from a collision with an automobile of the defendant in the State of Vermont, it appears that at the time of the collision the operator of the plaintiff's automobile was not licensed in accordance with a Vermont statute, and there is not introduced any evidence of the Vermont law as to the effect of such viclation of the statute, the common law in Vermont must be presumed to be the same as that of this Commonwealth, namely, that if the operation of the automobile without a license was not a cause contributing to the injury to the plaintiff, it does not bar recovery by the plaintiff.

In an action for damages resulting from a collision of an automobile of the plaintiff with one of the defendant in Vermont, it appeared that statutes of Vermont required owners of automobiles to register them annually, and that "no automobile or motor cycle shall be operated upon a public highway" unless so registered. It appeared that, at the time of the collision, the plaintiff's automobile was not so registered. It did not appear that the collision was caused by reckless or wanton action of the defendant. There was no evidence of the common law of Vermont. *Held*, that, in the absence of evidence as to the common law of Vermont on the subject, it must be presumed to be the same as that of this Commonwealth; that the plaintiff was a trespasser upon the highway when the collision took place, and that the defendant had violated no duty to him.

TORT for injury to an automobile of the plaintiff from a collision with an automobile of the defendant in Guilford, Vermont, alleged to have been caused by negligence of the defendant. Writ dated April 11, 1912.

In the Superior Court the case was tried before *Bell*, J. The material facts are stated in the opinion. In reply to special questions, the jury answered that at the time of the accident the plaintiff was in the exercise of "ordinary care" but that the

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defendant was not, that the negligence of the defendant caused damage to the plaintiff's automobile to the amount of $199.25, and that the fact that the plaintiff had no license to operate the automobile was not a contributing cause of the collision.

The judge thereupon ordered a verdict for the plaintiff in the sum of $199.25, stating, "The Supreme Court, if they find that want of registration is fatal, will order a verdict for the defendant without further ceremony. If they find it is not fatal, they can make such order as they think is right. If I order it the other way it would involve a new trial, if there was anything wrong about that." The defendant alleged exceptions.

F. J. Lawler, for the defendant.

W. A. Davenport, (*H. A. Weymoth* with him,) for the plaintiff.

SHELDON, J. This accident occurred in Vermont, and the rights of the parties are governed by the law of that State.

Under our decisions the illegal conduct of the plaintiff in operating his machine without a license to do so was merely evidence of negligence on his part. But on the whole evidence the jury have found, not only that he was in the exercise of due care, but also that this illegal conduct did not contribute to the injury sued for. Under our common law, therefore, it was not a bar to his recovery. *Holland* v. *Boston*, 213 Mass. 560. *Bourne* v. *Whitman*, 209 Mass. 155. *Moran* v. *Dickinson*, 204 Mass. 559. There was no evidence as to the law of Vermont upon this question, and its common law is presumed to be the same as ours. *Hazen* v. *Mathews*, 184 Mass. 388. *Gordon* v. *Knott*, 199 Mass. 173, 179. The plaintiff's recovery cannot be defeated upon this ground.

But it was undisputed that by the statute law of Vermont the owner of an automobile or motor vehicle must annually, by application to the Secretary of State upon a specified blank, cause it to be registered, and that a further statute provided that "no automobile or motor vehicle shall be operated upon a public highway" unless so registered. St. of Vermont, 1910, No. 132, 133. Did the plaintiff's failure to have his automobile so registered, and the fact that without such registration he was operating it upon a public highway in Vermont, prevent him from maintaining this action?

We held in *Dudley* v. *Northampton Street Railway*, 202 Mass. 443, that under our statutes one who was operating an automobile upon our public ways without its being registered as required by

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those statutes was a mere trespasser upon the way, and had no greater rights against persons who were lawfully using the way than that they should not recklessly or wantonly injure him or his property. That rule has been followed in our later cases. *Feeley* v. *Melrose*, 205 Mass. 329. *Trombley* v. *Stevens-Duryea Co.* 206 Mass. 516, 518. *Chase* v. *New York Central & Hudson River Railroad*, 208 Mass. 137, 156 *et seq.* *Bourne* v. *Whitman*, 209 Mass. 155, 172. *Love* v. *Worcester Consolidated Street Railway*, 213 Mass. 137. *Holland* v. *Boston*, 213 Mass. 560, 562. The *Dudley* case, *ubi supra*, turned partly upon the language of some of the provisions of the statute, which, so far as the evidence at the trial showed (and we cannot go beyond that evidence), are not found in the statutes of Vermont. But the decisive feature of our decisions has been that the prohibition of the use of unregistered automobiles upon the public ways was intended, not merely to create a public duty to be enforced in the ordinary administration of the criminal law, but to provide for the protection of travellers upon the highways, to regulate the rights of such travellers among themselves. So it was said in the *Dudley* case (202 Mass. 443, 448): "It is a reasonable assumption that the Legislature intended to put these forbidden and dangerous machines outside the pale of travellers." So again in *Chase* v. *New York Central & Hudson River Railroad*, 208 Mass. 137, 158, the court said: "Under the decisions, the operation of the unregistered automobile is deemed to be unlawful in every feature and aspect of it. Everything in the conduct of the operator that enters into the propulsion of the vehicle is under the ban of the law. In going along the way . . . the machine is an outlaw. The operator . . . is guilty of conduct which is permeated in every part by his disobedience of the law, and which directly contributes to the injury. . . . He is within the words of the statute." And this language was quoted and the rule reaffirmed in *Bourne* v. *Whitman*, 209 Mass. 155, 172.

It is to be regretted that we have not fuller evidence of the law of Vermont upon this question. But applying what we regard as the general rules of the common law, we can only conclude that the Vermont statute, like our own, was enacted, not only as a police regulation to govern the conduct of all persons in the State, but for the particular protection of travellers upon the high-

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ways, to guard them against the dangers that might arise from the operation of improper machines to which the State would not grant the privilege of registration, and to afford them means of redress in case of injury by enabling them readily to ascertain the name and address of the owner of an automobile from which they might suffer injury. The plaintiff by running his machine upon the public way violated the law which had been enacted for the protection of the defendant and others who should be lawfully using the way; and it was this violation of law which directly caused the accident. The case resembles in principle *Seaboard Air-Line Railway* v. *Chapman*, 4 Ga. App. 706.

There was no evidence that the defendant had acted recklessly or wantonly. That hardly has been contended.

A verdict should have been ordered for the defendant. Accordingly his exceptions must be sustained.

Under the terms of the bill, as shown by the statements made by the judge at the trial, the authority given by St. 1909, c. 236, should be exercised and judgment directed for the defendant.

So ordered.

ANDREW J. ROBINSON *vs.* WILLIAM J. COULTER & another.

Worcester. September 29, 1913. — October 21, 1913.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DE COURCY, JJ.

Libel and Slander. Pleading, Civil, Demurrer.

The publication of a defamatory statement in writing, which imputes to a building contractor a dishonest failure to comply with the requirements of a contract to erect a schoolhouse for a town, is an actionable libel, and, being in disparagement of the contractor's character and not merely of his work, no proof of special damage is required to maintain the action.

In an action by a building contractor, who had a contract to build a schoolhouse for a town, against the proprietor of a newspaper for the publication of an alleged libel charging the contractor for the building of the schoolhouse, not mentioning the plaintiff by name, with a dishonest failure to comply with the requirements of his contract, it is a question of fact for the jury whether the article was published of and concerning the plaintiff.

Upon a demurrer to the declaration in an action of tort for libel, where the publication alleged is libellous without proof of special damage, the question whether the declaration contains a sufficient allegation that the plaintiff suffered special damage cannot be raised unless it is assigned as a cause of demurrer.

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Upon a demurrer to the declaration in an action by a building contractor, who had a contract to build a schoolhouse for a town, against the proprietor of a newspaper for the publication of an alleged libel charging the plaintiff with a dishonest failure to comply with the requirements of his contract, where the declaration contains an averment that the words were published maliciously, it is not open to the defendant to contend that the statements were true or that they were privileged as a fair and reasonable comment and criticism on a matter of public interest, these being matters of defense which can be availed of only when they are set up in an answer, and which, even if they were open, would constitute no defense because the allegation of malice is admitted by the demurrer.

TORT for an alleged libel. Writ dated March 24, 1911.

The plaintiff's declaration, as amended, was as follows:

And the plaintiff says that on March 22, 1911, and for many years prior thereto, he was a contractor and builder carrying on his business in the town of Clinton in said County of Worcester, and in the towns in the vicinity of said Clinton; that he depended upon the income and profit of said business for his livelihood and enjoyed a good name and reputation for honesty and fair dealing in said business; that in March, 1910, the plaintiff, as a contractor and builder, entered into an agreement with the inhabitants of the said town of Clinton to build a public school building in said Clinton, called the Acre schoolhouse, according to certain plans and specifications, subject to such changes and alterations as might be directed by the architect of said building, said plans and specifications being made a part of said agreement; that the plaintiff built said Acre schoolhouse so called, in accordance with said agreement; that the defendants are the owners and publishers of a daily newspaper in said Clinton, called the Clinton Daily Item; that the said Clinton Daily Item had, at the time hereinafter stated, a large cirulation and was widely and generally read in said Clinton and in the towns in the vicinity of said Clinton; that on March 22, 1911, the defendants, with intent to cause it to be believed that the plaintiff had cheated, defrauded, and violated his said agreement with the inhabitants of the town of Clinton, in the matter of the building of the said Acre schoolhouse, did cause to be published and did publish in said newspaper a false and malicious libel concerning the plaintiff in his calling and business, as follows:

"On Tuesday afternoon, Dr. Mackay and Atty. Duncan went to the building. John T. McMahon, who is a contractor, was

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there and they went through the building and made investigations as to certain things that up to that time they were only cognizant of, by hearsay and, according to their questions put to the architect and the nature of his answers, they learned some things while in the building.

"When seen to-day, John T. McMahon, who was with the two members of the committee who went through the building on Tuesday, gave out the following statement: 'I have looked over the plans and specifications of the Acre schoolhouse at two different times and have been through the building on several occasions. I find that the building is generally below specifications and I believe from what I have observed that $1,000 may have been saved in this way.'

"In answer to some questions Mr. McMahan gave out the following: 'There are three floors in the building which according to the method he used for figuring the strength of floors are incapable of sustaining more than their own weight, with a good margin of safety and that they are not fit floors to have children on at the present time. The specifications of the floors was first-class maple 2½ inches wide; and third-class maple, mixed with birch was used.

"'The outside finish called for first grade cypress in the plans and poor pine was used, which is a saving of 300 per cent. in this material, the cost of cypress being about $80 per 1,000 feet, while pine can be bought for $25 per 1,000 feet.

"'The foundations of the building called for a coating of cement and tar to keep out the moisture and no cement was used on the foundations, the only material there being a coating of tar.'

"Among other things that Mr. McMahon said he found wrong with the building was that an inferior grade of slate was used, which information he says he received from a slater; that an inferior grade of glass was used in the windows. In the construction of the roof where copper should have been used paper was put in its place and in other places zinc was used instead of copper. Some steps in the rear of the building, which should have been stone according to the specifications, are of wood.

"It has been stated that the sewer connections have been paid for by the town when they were called for originally to be paid for by the contractor. When asked with regard to that

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statement Mr. McMahon said he saw the plans and he believed that the sewer connections should have been paid for by the contractor."

And the plaintiff further says that the defendants then and there, and by the words then and there published, as above alleged, publicly, falsely and maliciously accused the plaintiff of dishonesty, fraud, cheating and lack of good faith in his calling and business. That thereby the plaintiff was greatly injured in his good name and credit in his said calling and business, to his great damage, and has suffered great loss of income and profits by the loss of work, jobs and contracts, and by the loss of opportunities to bid for work, jobs and contracts; all to his great damage as claimed in his writ.

The defendants demurred to the declaration assigning as causes of demurrer the following:

1. That said declaration does not state a legal cause of action substantially in accordance with R. L. c. 173.

2. That it does not appear that the article relied on as libellous referred to the plaintiff or applied to him in a defamatory sense.

3. That said declaration does not contain a direct averment that the defendants charge the plaintiff with any crime or wrongdoing.

4. That the alleged libellous words do not by their natural import nor in connection with any facts or explanations stated in said declaration in any manner charge or impute any crime or wrongdoing to the plaintiff and are not in themselves actionable.

5. That said declaration does not contain a direct averment that the article relied on as libellous was published of and concerning the plaintiff in his trade and occupation.

6. That the language used does not import any personal reflection or attack upon the character of the plaintiff, either as an individual or in his business as a contractor and builder, but is merely a disparagement of the work done by him and therefore is not libellous.

7. That the article relied on in the plaintiff's declaration as libellous is not libellous.

The case was heard on the demurrer by *Ratigan*, J., who sus-

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tained the demurrer and ordered judgment for the defendants. From the judgment entered in accordance with this order the plaintiff appealed.

The case was submitted on briefs.

G. E. O'Toole & J. H. O'Brien, for the plaintiff.

D. I. Walsh, T. L. Walsh & J. H. Walsh, Jr., for the defendants.

De Courcy, J. A defamatory written statement which imputes to a contractor dishonesty or fraud in his business will in itself support an action for libel. Newell, Slander & Libel, (2d ed.) 195. *Lovejoy* v. *Whitcomb*, 174 Mass. 586. If the language of the newspaper article in question, taking the words in their natural sense, fairly may bear the meaning that the plaintiff dishonestly failed to comply with his contract to erect a school building, the demurrer must be overruled. "It is only when the court can say that the publication is not reasonably capable of any defamatory meaning, and cannot reasonably be understood in any defamatory sense, that the court can rule, as matter of law, that the publication is not libellous." Field, J., in *Twombly* v. *Monroe*, 136 Mass. 464, 469.

Under the law of libel and slander it is true that mere disparagement of another's goods or work is not actionable without averment and proof of special damage. *Boynton* v. *Shaw Stocking Co.* 146 Mass. 219. Here, however, the language, taken in its natural and ordinary meaning, is capable of being understood by the average man as a personal reflection on the plaintiff's character and not merely as a criticism of his work. Considered with reference to the subject to which they relate and the circumstances under which they were written, the words may be found to impute a lack of good faith on the part of the plaintiff in carrying out his building contract, and a dishonest substitution of inferior materials for those called for in the specifications, whereby the plaintiff defrauded the town to the amount of $1,000. Moreover, as the law of libel is of wider extent than that of slander, the printed language in question well may be considered libellous on the further ground that it is calculated to bring the plaintiff into disgrace by discrediting his good name. The question of libel or no libel was for the jury. *Lovejoy* v. *Whitcomb*, 174 Mass. 586. *Haynes* v. *Clinton Printing Co.* 169 Mass. 512.

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Whether the article was published concerning the plaintiff is a question of fact. It easily could be learned by those of the public who wished to discover it, aided by the facts and circumstances attending the publication, that the plaintiff was the contractor referred to. *Hanson* v. *Globe Newspaper Co.* 159 Mass. 293.

The demurrer does not raise the question whether there was a sufficient allegation that the plaintiff suffered special damage. *Morasse* v. *Brochu*, 151 Mass. 567. The issue of the truth of the statements, and the claim of qualified privilege based on the argument that the publication was a fair and reasonable comment and criticism on a matter of public interest cannot be availed of on the demurrer as they are matters of defense. And it is to be noted that the declaration avers that the words were published maliciously, proof of which would destroy the alleged *prima facie* privilege. *Commonwealth* v. *Pratt*, 208 Mass. 553. *Brown* v. *Harrington*, 208 Mass. 600. *Burt* v. *Advertiser Newspaper Co.* 154 Mass. 238.

Judgment reversed; demurrer overruled.

CHELSEA B. MATHEWS & another *vs.* PHILEMORE H. COLBURN.

Worcester. September 29, 1913. — October 21, 1913.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DE COURCY, JJ.

Equity Pleading and Practice, Master's report: exceptions to report, motion to recommit, Decree.

Exceptions to a master's report based on the ground that certain findings of fact made by the master were not warranted by the evidence before him must be overruled if the evidence on which these findings were made is not reported.

Where a suit in equity has been referred to a master under a rule requiring him to find the facts without reporting the evidence, if a party, who has taken part in a trial of the case before the master mainly on a simple question of fact without asking the court for any special order directing the master to report the whole or any part of the testimony, after the master has filed a draft report adverse to him moves to recommit the case to the master for a report of the evidence, the denial of the motion is a matter within the discretion of the trial judge. In the present case there was nothing in the record to indicate that this discretion had been exercised wrongly in denying such a motion.

In a suit in equity to enjoin the defendant from cutting wood on fourteen acres of land alleged to belong to the plaintiff, where the defendant's answer denies the

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plaintiff's title to the whole fourteen acres and also sets up title in the defendant to four acres of the land, and where the plaintiff fails to prove that he was the owner of the land on which the wood was cut and the defendant is entitled on this ground to a decree dismissing the bill with costs, but the trial judge makes a decree which goes further than this and adjudges that the defendant is the owner of the lot from which the wood was cut including the four acres claimed in the defendant's answer, thus virtually reforming a certain deed, the decree must be reversed on appeal, because such relief only can be granted upon a cross bill.

DE COURCY, J. This is a bill in equity, seeking to enjoin the defendant from cutting, removing or selling the wood and timber on a fourteen acre tract of land situate in the town of Hardwick. It appears from the report of the master to whom the suit was referred, that the land involved in the controversy is a piece containing about eight acres, indicated on the plan as the Perry Cheever lot, included in which is a four acre portion designated the P. H. Colburn lot. The defendant's answer denied the plaintiffs' alleged title in the premises. The master finds that the defendant, by deed, acquired the title to the four acre portion in November, 1910, and that he and his predecessors in title have had actual, open, visible, adverse and continuous possession, under a claim of title, of the entire Perry Cheever lot of eight acres for more than thirty-five years before the bringing of this bill. The appeals * of the plaintiffs bring before us the exceptions to the master's report, the motion to recommit the case to the master, and the final decree.

1. The exceptions, so far as material, are on the ground that certain findings of fact made by the master are not warranted by the evidence before him. As the evidence on which these findings were made was not before the trial judge, it is manifest that he was not in a position to revise them, and was right in overruling the exceptions. *Nichols* v. *Ela*, 124 Mass. 333. *Attorney General* v. *Vineyard Grove Co.* 211 Mass. 596.

2. Under the rule issued in this case the master was required to find the facts, but was not to report the evidence taken by him.

* From an interlocutory decree made in the Superior Court by *Ratigan*, J., denying a motion to recommit the master's report, overruling the plaintiffs' exceptions to the master's report and confirming that report, and from a final decree also made by *Ratigan*, J., which is described in the opinion. The master was Hubert M. Coney, Esquire.

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During the progress of the hearings it was open to the plaintiffs to move in court for a special order directing the master to report the whole or any part of the testimony if they deemed it desirable. They made such a motion for the first time after the master had filed a report adverse to them, — a proceeding which never is looked upon with favor. *Parker* v. *Nickerson*, 137 Mass. 487. *Cook* v. *Scheffreen*, *ante*, 444, and cases cited. The case was tried at considerable length and mainly on a simple issue of fact, that of adverse possession. The motion to recommit was addressed to the discretion of the court, and we find nothing in the record to indicate that the discretion was wrongly exercised.

3. The appeal from the final decree raises the question whether it is warranted by the allegations of the bill and answer and by the findings of the master. The bill avers title in the plaintiffs to a tract of fourteen acres; and, while the defendant by his denial puts that title in issue, his answer sets up a claim of title in himself to the four acre portion only, designated the P. H. Colburn lot. It is found that all the wood and timber cut was from the Perry Cheever lot of eight acres, which embraced the P. H. Colburn lot. Under the pleadings the plaintiffs had the burden of proving that they owned the Cheever lot and that the defendant cut the timber growing thereon. Failing to sustain this burden their bill should have been dismissed with costs. As both the question of title and that of cutting down the timber were fully tried, it would have been proper to state in the decree the issue on which it was entered, namely, that the plaintiffs failed to show title to the lot on which the defendant cut the wood. But the decree goes further and grants affirmative relief to the defendant, by virtually reforming his deed from Charles F. Hills, and by adjudging that he is the owner of the Cheever lot. Under our existing practice, the proper basis for such relief would be a cross bill filed by the defendant. *Andrews* v. *Gilman*, 122 Mass. 471. *Holbrook* v. *Schofield*, 211 Mass. 234. The decree must be reversed and a final decree entered in accordance with this opinion; and it is

So ordered.

A. Monroe, for the plaintiffs.

J. H. Schoonmaker, for the defendant, submitted a brief.

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GERTRUDE OSWALD *vs.* DANIEL J. DONOHUE.

Worcester. September 29, 1913. — October 21, 1913.

Present: RUGG, C. J., MORTON, HAMMOND, SHELDON, & DE COURCY, JJ.

Negligence, Employer's liability, In a laundry. *Pleading, Civil*, Answer. *Evidence*, Presumptions and burden of proof.

In an action for personal injuries sustained by the plaintiff in the employ of the defendant, the defense that the plaintiff assumed the risk of the injury is not open to the defendant unless it is set up in the answer, and, when it is so set up, the burden is on the defendant to prove it.

In an action for personal injuries sustained by the plaintiff in the employ of the defendant, where the defendant sets up and relies upon the defense that the plaintiff assumed the risk of the injury, if it appears that the danger came into existence after the contract of employment was made, the question of assumption of risk usually is one of fact for the jury.

In an action against the proprietor of a laundry, for personal injuries sustained by the plaintiff, a girl seventeen years of age, from her hand being caught between the rollers of a steam mangle, where it appears that the plaintiff never before had worked on a mangle and was injured when she had been working on this machine only an hour and a half and that the machine was out of order, it is for the jury to say on the evidence whether the plaintiff fully comprehended the danger to which she was exposed and voluntarily assumed the risk of an injury due to the machine running irregularly.

A girl seventeen years of age, who is set at work upon a steam mangle in a laundry when wholly without experience in working on such a machine, is not negligent as matter of law in continuing to work when she sees that the mangle is running somewhat irregularly, especially when she is working in the presence and under the direction of a person who has been entrusted with the duty of instructing her and is doing her work in the way she has been shown.

DE COURCY, J. In the course of her employment in the defendant's laundry, and while she was at work on a steam ironing machine known as a mangle, the plaintiff sustained severe injuries by reason of her hand being drawn in between the rolls; and she brought this action to recover damages therefor. The declaration contains counts both at common law and under the employers' liability act, but it is conceded by the plaintiff that the case was submitted to the jury on the common law counts. One of these was for alleged failure properly to instruct and qualify the plaintiff for her duty before putting her at work on a dangerous machine with

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which she was not acquainted, the other was for negligent failure to provide the plaintiff with suitable machinery with which she could perform her duty without being exposed to unnecessary dangers, and to maintain the same in suitable condition and repair. There was a verdict for the plaintiff; and the case is here on the defendant's exception to the judge's * refusal to rule that on all the evidence the plaintiff could not recover.

1. It is virtually conceded that there was evidence for the jury on the issue of the defendant's negligence. He had just moved into his new location on Harding Street, and there was testimony that the mangle was working irregularly, first running fast and then slow; that the driving belt was moving from one pulley to the other; that there was unusual speed and vibration of the machinery until the pulley on the main shaft was changed after the accident, and that no instructions were given to the plaintiff as to how she was to do her work in safety. This, and other like testimony, if believed, would warrant a finding of negligence.

2. The defense of assumption of risk is not set up in the answer and consequently is not open to the defendant. *Leary* v. *William G. Webber Co.* 210 Mass. 68. Aside from the question of pleading, the defendant has the burden of proving this affirmative defense; and where, as here, the danger comes into existence after the contract of employment, this issue generally is one of fact for the jury. *Fitzgerald* v. *Connecticut River Paper Co.* 155 Mass. 155. *Griffin* v. *Joseph Ross Corp.* 204 Mass. 477. That the plaintiff knew the machine was running fast or irregularly is not decisive, especially in view of the fact that she never before had worked on a mangle, and was injured when she had been working on this machine only an hour and a half. It was for the jury on all the evidence to decide whether the plaintiff fully comprehended the danger to which she was exposed and voluntarily assumed the risk. *Glass* v. *Hazen Confectionery Co.* 211 Mass. 99.

3. It could not be ruled as matter of law that the plaintiff was not in the exercise of due care. She was seventeen years of age, with no experience in working on a steam mangle. Although

* *Lawton*, J.

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aware that the machine was running somewhat irregularly, she recognized nothing unusual in that, as she was ignorant of the ordinary and proper operation of such a machine. She was working in the presence and under the direction of Miss Coakley, who had been entrusted with the duty of instructing her, and was doing her work in the way she was shown. Without further reciting the evidence in detail, we think that the question whether her conduct measured up to the standard of a person of ordinary prudence was one of fact for the jury. *Rivers* v. *Richards*, 213 Mass. 515.

Exceptions overruled.

The case was submitted on briefs.

P. J. O'Connell & J. P. Halnon, for the defendant.

D. I. Walsh & T. L. Walsh, for the plaintiff.

LILLIAN M. GLOVER *vs.* SEYMOUR GLOVER.

Middlesex. March 17, 1913. — October 22, 1913.

Present: RUGG, C. J., MORTON, LORING, SHELDON, & DE COURCY, JJ.

Widow, Allowance. *Probate Court*, Appeal.

An allowance made to a widow under the provisions of R. L. c. 140, § 2, should not exceed an amount sufficient to provide for the necessities of the widow for such a period after the death of her husband as will give her an opportunity to adjust herself to her new situation.

On an appeal from a decree of a single justice of this court allowing a widow under the provisions of R. L. c. 140, § 2, upon her petition filed a year and ten months after her husband's death, the sum of $1,500, it was *held*, after a review of the evidence and giving to the petitioner the benefit of the most favorable inference to be drawn from it, that $500 was a sum sufficient to provide for her necessities.

PETITION for a widow's allowance, filed in the Probate Court on September 22, 1911, by the widow of Clarence F. Glover, late of Waltham, who died on November 20, 1909, and whose will was allowed on December 22, 1911.

In the Probate Court the petition was heard by *McIntire*, J., who made a decree allowing the petitioner $2,500.

On appeal by Seymour Glover, a beneficiary under the will

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of Clarence F. Glover, the case was heard by *Braley*, J., a commissioner having been appointed to take the evidence, and a decree was made remanding the case to the Probate Court with directions to modify the decree so as to allow the widow $1,500. Seymour Glover appealed.

Other material facts are stated in the opinion.

E. R. Anderson, (*G. A. Sweetser* with him,) for the respondent.

J. F. Lynch, for the petitioner.

LORING, J. This is an appeal from a decree granting to the petitioner a widow's allowance in the sum of $1,500. The case is before us on the evidence introduced before the single justice who made the decree, excepting however that the exhibits introduced in evidence before him have not been printed. The evidence is far from satisfactory. It leaves in a state of confusion the facts on which the questions of the petitioner's right to an allowance and of the amount of it depend. The appellee has not objected to the failure to print the exhibits, and we take the case as it is presented to us without objection on the part of either party.

The law governing the questions which we have to decide is settled. In *Dale* v. *Hanover National Bank*, 155 Mass. 141, Knowlton, J., said that an allowance, if made, is to be made "to provide for the necessities of the widow and minor children for a short time, until they have an opportunity to adjust themselves to their new situation." In *Chase* v. *Webster*, 168 Mass. 228, 231, Barker, J., said: "It is a question of the widow's actual necessities." It was held in *Porter* v. *Porter*, 165 Mass. 157, that although the widow was in necessitous circumstances and did not have proper clothing and was $100 in debt, two years and four months after the husband's death a second widow's allowance could not be made. Allen, J., in delivering the opinion of this court in that case, said, at p. 159: "The allowance is to be made in view of the condition of things at or immediately after the death of her husband." But it was held in *Lisk* v. *Lisk*, 155 Mass. 153, that an allowance could be made where the petition for an allowance was filed by the widow two years and eight months after the husband's death; and Knowlton, J., in delivering the opinion of the court in that case said, at p. 154: "It has never been held that, because the necessities of a widow have been relieved through

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the charity of friends, or in some other way outside of herself, she is deprived of the right given her by the statute to have them provided for by an allowance in the Probate Court, so long as there is personal estate undistributed in the hands of the executor or administrator. An application for a widow's allowance ought to be made at an early stage of the proceedings before the Probate Court, and it ought not to be granted if it comes so late that the granting of it will cause embarrassment or difficulty in the settlement of the estate. Indeed, ordinarily the occasion for it ceases to exist within a short time after the appointment of the executor or administrator. But if a widow has borrowed money for the relief of her necessities, or received it through charity, there is no reason why the means of repaying it should not be furnished her by an allowance out of her husband's estate, to the same extent as if she had applied for the allowance before she obtained the means of relief." To the same effect see *Welch* v. *Welch*, 181 Mass. 37.

It is of course the rule that the decree of the single justice is not to be overturned unless it is plainly wrong.

Clarence Glover, the husband of the petitioner, died on November 20, 1909. The petition now before us was filed a year and ten months later (on September 22, 1911), and the hearing before the single justice apparently was in July, 1912, two years and seven months after the husband's death. It is important to bear this in mind because much of the evidence introduced before the single justice showed the actual necessities of the petitioner at that time (two years and seven months after the husband's death) in place of her actual necessities "at or immediately after the death of her husband." There were no children of the marriage. The petitioner waived the provisions made for her in her husband's will, and thus became entitled to $5,000 and half of the remaining personal property and of the remaining real estate. R. L. c. 140, § 3, cl. 3, as amended by St. 1905, c. 256. *Walden* v. *Walden*, 213 Mass. 418.

It appears that the petitioner came to this country in 1900 or thereabouts, and that she then could not either read or write. We assume that she could do both at the date of her husband's death. It appeared that she had not kept any account of her receipts and expenditures, and in answer to this question put to

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her by her own counsel, "You don't keep any books for the property you claim to own?" she testified: "My education is so limited I could not tell one thing from another; I keep my own figures. . . . I have it in my head."

At the time of her husband's death the petitioner owned three houses, all in Waltham, one on Main Street, one on Orange Street, and one on Clark Lane which was subject to a mortgage of $500. The house on Main Street had twelve rooms and was the house in which the petitioner and her husband were living at the time of his death. The petitioner continued to live in this house until May, 1912, *i. e.*, for two years and five months after her husband's death. At the time of the hearing the petitioner was "charging $25 a month" for this house.

The Clark Lane property was rented for $30 a month until November 1, 1911, *i. e.*, for two years after the death of the husband.

The Orange Street property was a four tenement building. All the tenements had been let from the death of the husband until September, 1911, a year and ten months after the death of her husband. The monthly rent of all four tenements was $66. At some time not disclosed in the evidence a tenant moved out of one of these four tenements owing the petitioner fourteen months' rent, at $17 a month.

To sum up the facts as to the petitioner's real estate: For two years and five months she lived in a house which let for $25 a month, or $300 a year, and she was in receipt of a gross income from the other two of $96 a month, or $1,152 a year subject to the loss of $238 rent at some period not disclosed in the evidence. The petitioner testified without objection that she figured up that she received from these three pieces of real estate from the death of her husband "to the present time, the first of July," 1912, $2,790, and had paid out $2,355.82. At the time of her husband's death the petitioner had $4,300 in the bank, and in January following her husband's death she received $1,990 under a policy of insurance on her husband's life. This she kept for two or three months and then put it in the bank.

The husband left real estate appraised at $5,500, and personalty appraised at $33,205.64. Of this personalty, appraised at $33,205.64, the petitioner contended that she owned property

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amounting to $21,300, consisting of one hundred and ninety-eight shares of stock in a laundry corporation taken at par, and an automobile appraised at $1,500. Of the remaining personalty appraised as belonging to her husband's estate (amounting to $11,905.64), $8,150 was the appraised value of sixty shares of American Telephone and Telegraph Company, and $3,755.64 was the value of personalty the nature of which was not disclosed in the evidence. As a widow's allowance takes precedence of debts, the claims against the husband's estate, although of some, are not of vital importance. The executor testified that a claim had been put in for expenses of administration down to the appointment of the executor, amounting to $8,051.08, not including some additional legal services incurred by the estate in litigation against it begun by the petitioner. Of this $8,051.08 the sum of $4,650 was a charge made by the executor for his services, and beyond that it did not appear what the $8,051.08 consisted of or how it was made up. In addition there was a claim against the estate on a note for $6,000 held by a brother of the petitioner and claims held by other persons amounting to $1,557.98.

When asked what her style of living was "during the few months" before her husband's death, the petitioner testified: "Why, we had an automobile, we travelled, we had a horse and team, we had dogs. We travelled a great deal, and I had a maid and we had a man to take care of the grounds; off and on I had a gardener and a chauffeur part of the time. . . . We spent about five or six hundred dollars, perhaps over, perhaps less" a month. "When we travelled of course we spent a great deal more money. We went to Jamaica, which was a very expensive trip; and we went to the Thousand Islands, and of course that was expensive. Then we took trips to the beaches sometimes and to the theatres once or twice a week, and we always had swell dinners." And she testified in effect that the money for these expenditures came from "my laundry." She further testified, when asked what her style of living had been since her husband's death: "Very poorly; I have lived in the kitchen; I had no coal to burn in the furnace; I bought two tons last winter; I had no money to buy coal with. I had no man to do things around the house; I had to do all the work of cooking and everything else. And I have had no dogs,

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no horse, no automobile — I have got nothing; half the time I have had no food. I have borrowed the dress on my back; I have $1.15 hat, and I paid $1 at Raymond's for these slippers I have on, and that is the way I am living today."

There are hints here and there through the evidence of litigation in addition to the litigation begun by the petitioner against the estate. The petitioner testified that she handed the $4,300 cash which she had on hand at her husband's death to Mr. Elmore, who it appeared was an attorney at law and executor of her husband's will. She testified however that it was not handed to him as executor and that she gave it to Mr. Elmore because "he said he had to get some money because the Glover brothers were crooks, and they would do a lot of bad things if he didn't get the money from me." Mr. Elmore was a witness in the case, but no explanation of this was given by him.

In view of the amount allowed by the single justice the view of the evidence should be taken which is most favorable to the petitioner. Although that view of the evidence is to be taken, there are some aspects of it which must be considered. Manifestly the petitioner was not a person of social standing, a fact referred to in *Dale* v. *Hanover National Bank*, 155 Mass. 141, as of some importance. Her account of "her style of living since her husband's death" related in the main to a period long after that which is to be considered in determining the granting of a widow's allowance, viz., the time "at or immediately after the death of her husband." And the summary of the receipts from and expenditures upon her three houses for two years and five months succeeding her husband's death is open to the same objection. In view of the other evidence as to these parcels of real estate and of her inability and failure to keep any books of account, the accuracy of these figures is open to doubt.

Giving to the petitioner the benefit of the most favorable inference to be drawn from the evidence, we are of opinion that under all the circumstances of this case $500 is as large an allowance as properly can be made. The decree of the Probate Court must be modified so as to give her that sum.

Decree accordingly.

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WILLIAM LAYS & another *vs.* JAMES H. HURLEY & others.

Norfolk. March 26, 1913. — October 22, 1913.

Present: RUGG, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON, & DE COURCY, JJ.

Mechanic's Lien, Statement of lien. *Partnership.*

In order that a statement of a mechanic's lien claimed by a partnership may comply with the requirements of R. L. c. 197, § 6, that a statement of a lien shall be filed by "the person claiming it" and shall be "signed and sworn to by him or a person in his behalf," it is sufficient if it is signed in the name of the firm by one of the partners and is sworn to by that partner. In the present case there was evidence warranting a finding that the acts of one partner, in signing and swearing to a statement in the name of a partnership composed of two brothers, were authorized and ratified by the other partner.

PETITION to enforce a mechanic's lien, filed on May 26, 1911, by William Lays and Samuel T. Lays, copartners doing business under the firm name of Lays Brothers.

In the Superior Court, after findings favorable to the petitioners had been made by a jury upon issues submitted to them, the case was heard by *Crosby*, J. The material facts are stated in the opinion. A decree was entered for the petitioners. The respondents alleged exceptions.

The case was argued at the bar in March, 1913, before *Rugg*, C. J., *Morton*, *Loring*, *Sheldon*, & *De Courcy*, JJ., and afterwards was submitted on briefs to all the justices.

H. F. Parker, (*W. J. Good* with him,) for the respondents.

E. H. Fletcher, for the petitioners.

DE COURCY, J. The petitioners, under a written contract with the respondent Hurley, dated April 12, 1910, constructed a building on his premises, and now seek to enforce a mechanic's lien on the property for the balance due to them. It is admitted that there was evidence at the trial to establish all the allegations in the petition to enforce the lien and all the jury's findings on the issues of fact submitted to them, provided the statement of lien filed in the registry of deeds was sufficient. The respondents contend, however, that the statement did not comply with

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the requirements of the lien statute for the reason that the individual name of Samuel T. Lays, one of the lienors, did not appear therein, and for the further reason that it was not signed or sworn to in his behalf.

The question at issue involves the construction of R. L. c. 197, § 6, which provides that the lien shall be dissolved unless "the person claiming it" within thirty days after the labor is performed or materials furnished files in the registry of deeds "a statement, signed and sworn to by him or a person in his behalf," containing a true account of the amount due him, a description of the property sufficiently accurate for identification, and the name of the owner, if known. In construing this provision it is to be borne in mind that the filing of the certificate does not create the lien, but merely keeps it alive so that proceedings may be taken to enforce it. The lien comes into existence when the petitioners perform the labor and furnish the materials. *Wiley* v. *Connelly*, 179 Mass. 360. *Clifton* v. *Foster*, 103 Mass. 233, 235. And while the petitioners must bring themselves strictly within the terms of § 1 of the statute, which provides for the creation of a lien incumbrance on real property, yet, as was said by Lord, J., in *Trask* v. *Searle*, 121 Mass. 229: "When a lien attaches, the provisions of law upon the subject being remedial, a liberal construction will be put upon the statute for the purpose of accomplishing its objects." This liberality is illustrated by the provisions of §§ 6 and 7, which deal with inaccuracies in stating the contract price, or the amount and value of the labor furnished, and with mistakes in the landowner's name.

The statute specifically provides what particulars shall be set out in the statement, and does not, expressly at least, require that the individual names of the lien claimants be inserted. Nor does it seem important in determining the rights of the parties that the name of each partner should be stated, as any person interested easily could ascertain who comprised the firm of Lays Brothers. We find no warrant in the language or in the spirit of the statute for the contention of the respondents that a failure to insert in the statement the individual names of both partners is fatal to the lien claimed. *Getchell* v. *Moran*, 124 Mass. 404. *Brosnan* v. *Trulson*, 164 Mass. 410.

The second and third grounds of objection are based on the re-

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quirement of the statute that the statement shall be signed and sworn to by the lien claimant or by a person in his behalf. The statement in question certified that the account was due to "William Lays and copartners doing business as Lays Brothers," and concluded as follows: "I further certify that said Lays Brothers ceased to perform and furnish labor and furnish materials for said building on the tenth day of March, 1911, and that, [*sic*] and they hereby claim a lien on said building, and upon the interest of the owner thereof in the lot of land upon which the same is situated, to secure payment of the debt due said Lays Brothers as aforesaid and of the costs which may arise in enforcing said lien." It was signed "Lays Brothers by William Lays," and was sworn to by William Lays. The account recited "James H. Hurley to Lays Brothers, Dr."

It appeared at the trial that the petitioners were brothers and had been doing business as copartners under the firm name of Lays Brothers since 1908. These facts were known to the respondent Hurley; and in the body and signature of their written contract with him they appear only by the firm name, — no mention of the individual names of Lays Brothers being made therein. The respondent Scott resided in the same city as the petitioners. There was no claim or evidence that either respondent was misled by the omission of the name of Samuel T. Lays from the certificate of lien; and although both respondents were in court at the trial, neither was called to testify. It further appears that at the trial William Lays testified that he filed the statement on behalf of Lays Brothers; and Samuel T. Lays joined in the petition for the enforcement of the lien, and testified at the trial in support of it.

In our opinion the trial judge would be warranted by the evidence in finding that the statement was signed and sworn to by the lien claimant or a person in his behalf, within the requirements of the lien statute. The certificate in question fairly purports to be the statement of the individuals who comprise the firm of Lays Brothers. William Lays as partner presumably was authorized to sign it on behalf of the firm, or, what was the legal equivalent thereof, it could be found that Samuel T. Lays ratified his act. *Batchelder* v. *Hutchinson*, 161 Mass. 462. The affidavit also, although informal, sufficiently shows that the

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affiant was acting in behalf of himself and his partner in attesting the correctness of the statement. *Patrick* v. *Smith*, 120 Mass. 510. But we think that the signature and attestation were sufficient on the broader ground that as the certificate is merely a proceeding *in pais* a signature and attestation in the firm name alone was sufficient. In this respect it is like the written contract between the parties on which the lien was founded, and which was as valid when signed by Lays Brothers as if executed in their individual names. It is enough that the lien is preserved in the same name by which it is created, so far as proceedings *in pais* are concerned.

It is to be noted that the names of the individual partners duly appear as parties in the petition to enforce the lien subsequently filed in court, on which the trial judge entered a decree establishing the lien. R. L. c. 197, § 17. The process of enforcing the lien had then reached the stage of court proceedings, and was subject to the rules governing pleadings. As our law does not recognize a partnership itself as a legal entity, the individual members properly appear as petitioners. *Faulkner* v. *Hyman*, 142 Mass. 53, 55.

In view of the argument that the absence of the individual names of the lien claimants would create uncertainty as to proper obligees for the bonds provided for in §§ 28 and 30, we may call attention to St. 1907, c. 539, which requires persons transacting business as a partnership under any title other than the real names of the persons conducting such business to file with the clerk of the city or town in which the business is conducted a certificate stating the full name and residence of each member.

The testimony of the petitioners that there was no one else doing business under the name of Lays Brothers in the counties of Norfolk or Plymouth, or elsewhere within their knowledge, even if immaterial, could not have harmed the respondents.

Exceptions overruled.

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GEORGE W. JONES *vs.* MEYER SCHEIN.

Middlesex. March 28, 1913. — October 22, 1913.

Present: RUGG, C. J., MORTON, LORING, SHELDON, & DE COURCY, JJ.

Malicious Prosecution.

In an action for malicious prosecution, there was evidence tending to show, that the defendant had told the chief of police of the town where he lived that five geese had been stolen from his yard and that he had seen the plaintiff and his brother "hanging around" there the night before. On this statement being made to a trial justice, a warrant to search the house of the plaintiff's brother was issued, a search was made and four of the geese were found in the cellar, and the plaintiff, who was boarding in the house, was found upstairs and was arrested as the person in whose possession the geese were found. He was held in custody for two days, when a complaint was made against him signed by the chief of police, charging him with larceny of the geese, on which charge he was tried and acquitted. The defendant admitted that the plaintiff was not "hanging around" his place on the evening in question. The plaintiff testified that, when he asked the defendant why he had had the plaintiff arrested, the defendant said that "he was sorry, he thought" the plaintiff "was the one." *Held*, that the jury were warranted in finding that the defendant caused the charge to be made against the plaintiff without probable cause to believe him guilty and with no sincere belief in his guilt, and that it could not be ruled as a matter of law that there was no evidence upon which the plaintiff might recover.

TORT for malicious prosecution. Writ dated January 5, 1910.

In the Superior Court the case was tried before *Lawton*, J. The material facts are stated in the opinion. At the close of the plaintiff's evidence, the defendant rested and asked the judge to rule (1) "that there was no evidence upon which the plaintiff might recover," and (2) "that upon the plaintiff's evidence, the defendant was entitled to a verdict." The rulings were refused. The jury found for the plaintiff in the sum of $1,000; and the defendant alleged exceptions.

The case was submitted on briefs.

M. S. Case, for the defendant.

W. J. Corcoran, for the plaintiff.

LORING, J. On Christmas morning, 1909, the defendant told the chief of police for the town of Saugus that five geese had been stolen from his yard, and that he had seen the plaintiff and his

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brother "hanging around" there the night before. On the story being told to the judge * a warrant to search the house of the plaintiff's brother was issued; four of the geese were found in the cellar, and the plaintiff, who was a boarder in the house, was found upstairs and arrested as the person in whose possession the geese were found. He was held in custody until Monday, December 27, when a complaint was made against him signed by the chief of police, charging him with the larceny of the geese. He was tried on December 31 and acquitted. Thereupon this action for malicious prosecution was brought. At the trial the defendant admitted that the plaintiff was not "hanging around" his place in Saugus on the evening in question. The plaintiff testified that he asked the defendant "what he had me arrested for" and that the defendant said "he was sorry, he thought I was the one." In this the plaintiff was corroborated by his wife. The defendant without going on the stand as a witness rested on the plaintiff's evidence and asked for a ruling that on this evidence the plaintiff could not recover.

Even then a verdict for the defendant well might have been expected, but we cannot say that as matter of law the jury were bound to find for him. They were warranted in finding on the admissions of the defendant that he caused the charge of larceny to be made against the plaintiff in the case at bar, although the complaint was signed by the chief of police. And the fact that the defendant here told the chief of police that he saw the plaintiff "hanging around" his place on the night before, when admittedly the plaintiff was not there, warranted a finding that the charge was made without probable cause to believe him to be guilty; and from this the jury were warranted in inferring that the charge was made in bad faith, without any sincere belief in the plaintiff's guilt. For the facts which must be proved to make out a case of tort for malicious prosecution see *Falvey* v. *Faxon*, 143 Mass. 284, 285. The entry must be

Exceptions overruled.

* A trial justice.

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ANTONIO CERCHIONE *vs.* HENRY S. HUNNEWELL & others, trustees.

Suffolk. March 28, 1913. — October 22, 1913.

Present: RUGG, C. J., MORTON, HAMMOND, LORING, BRALEY, SHELDON, & DE COURCY, JJ.

Nuisance. Negligence, Of one controlling real estate. *Landlord and Tenant.*

The owner of a building in the city of Boston, to which St. 1892, c. 419, § 66, applies, is not liable to a person injured from slipping on ice on the adjoining sidewalk formed by water discharged from a spout attached to the building, if at the time of the accident the building was occupied by a tenant to whom it was leased by an unrecorded lease for twenty years, under which he had the right to make alterations and repairs or to remove the building and erect a new one in its place and who covenanted to save the owner harmless from damage occasioned by any nuisance made or suffered on the premises and from any damage arising from neglect in not removing snow and ice from the sidewalks bordering on the premises. Following *Coman* v. *Alles*, 198 Mass. 99.

RUGG, C. J. There was evidence tending to show that the plaintiff, in the exercise of due care, on January 1, 1912, was injured by slipping on a sidewalk in Boston, on ice formed from water discharged from a spout on a building owned by the defendants which had been in the same structural condition for about eleven years. The building was of such size that by St. 1892, c. 419, § 66,* it was required to have "leaders sufficient to carry all the water to the street, gutter or sewer, in such manner as not to flow upon the sidewalk." The spout in question discharged water from a conductor on the roof and ended about five inches from the sidewalk. In the Superior Court, the presiding judge,† subject to the defend-

* St. 1892, c. 419, relates "to the construction, maintenance and inspection of buildings in the city of Boston." The whole of § 66 is as follows: "All buildings over forty-five feet high shall have suitable water-tight metallic leaders, and all buildings shall have leaders sufficient to carry all the water to the street, gutter or sewer, in such a manner as not to flow upon the sidewalk, or to cause dampness on any wall, yard or area."

† *Dana*, J.

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ants' exceptions, refused to allow them to show that the building was leased to a tenant for the term of twenty years from July 31, 1906, by unrecorded leases, according to which the lessee took possession of the entire premises in their then condition, with the right to make such alterations and repairs as it might deem expedient and to remove the building and erect a new one in its place, all in compliance with the requirements of the public authorities and subject only to the approval of the plans by the lessors or their architect, and covenanted to save the defendants as lessors harmless from all loss or damage occasioned by any nuisance made or suffered on the premises, and from any claim or damage arising from neglect in not removing snow and ice from the sidewalks bordering on the premises. The question is whether there was error in this ruling.

A landowner in the possession of his premises, who gathers water and pours it in an artificial channel in such manner as to cause the accumulation of ice upon a sidewalk, is the efficient cause in the creation of a nuisance and may be held liable for the damages which ensue as a probable consequence. *Field* v. *Gowdy*, 199 Mass. 568. Where such premises are let to a tenant at will who simply agrees to pay rent and assumes only the obligations flowing from the relation of tenancy at will, the landlord still may be held liable. *Jackman* v. *Arlington Mills*, 137 Mass. 277. *Maloney* v. *Hayes*, 206 Mass. 1. *Marston* v. *Phipps*, 209 Mass. 552. Where there is a lease of premises on which a nuisance exists or such a condition as plainly will lead to the creation of a nuisance, and a surrender of control is made to the tenant without any express agreement touching the nuisance, then the landlord may be found to have contemplated the continuance of the illegal or dangerous condition by the tenant and may be held responsible for damages resulting therefrom. *Jackman* v. *Arlington Mills*, 137 Mass. 277. But where there is a transfer of possession to a tenant under a genuine lease, by which he is given the right to make alterations and even to replace the existing structures by new, and agrees to save the lessor harmless from damages arising from any nuisance and especially from unremoved snow and ice, it cannot be said that the landlord contemplates the existence of ice on the sidewalk. As was said by Sheldon, J., in *Coman* v. *Alles*, 198 Mass.

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99, "if the premises can be used by the tenant in the manner intended by the landlord without becoming a nuisance, then the landlord is not liable for any nuisance created by an act of omission or of commission" done by the tenant after he has taken possession under the lease. The circumstances of the case at bar make it indistinguishable from that case, by the authority of which it is governed. The possibility that the tenant might allow the water from this spout to flow upon the sidewalk and freeze and accumulate there in such quantities as to become dangerous does not warrant the inference that the defendants contemplated that method of using the premises any more than in *Coman* v. *Alles*, and in *Wixon* v. *Bruce*, 187 Mass. 232. At the time the lease was made in July, 1906, there was no nuisance of the sort now complained of on the premises. The direct source of the injury to the plaintiff here, as in other cases, was the wrongful conduct of the tenant in failing to prevent the improper accumulations of ice upon the adjacent sidewalk. Liability stops with this proximate cause. *Clifford* v. *Atlantic Cotton Mills*, 146 Mass. 47. The effect, in shielding a landlord from liability, of an express agreement in a lease, putting a duty upon the tenant to relieve against a nuisance, or the conditions from which a nuisance may be produced by an unrestrained operation of natural causes, is recognized in *Dalay* v. *Savage*, 145 Mass. 38, 42; *Cavanagh* v. *Block*, 192 Mass. 63, 65, 66; *Quinn* v. *Crimmings*, 171 Mass. 255, 256; *Pretty* v. *Bickmore*, L. R. 8 C. P. 401; and *Gwinnell* v. *Eamer*, L. R. 10 C. P. 658.

Under the lease offered in evidence it does not appear that the landlord let a nuisance and took rent as compensation for the use of the nuisance. If he had done this, the landlord might have been liable. But whether the nuisance should exist or not depended solely upon the act or omission of the tenant. In such case the tenant and not the landlord is liable.

St. 1907, c. 550, § 132, was not in force at the time the lease in question was made and therefore it is unnecessary to decide what effect, if any, it might have.

The result is that in the opinion of a majority of the court the offered evidence of the lease erroneously was excluded. But this is not a proper case for the application of St. 1909,

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c. 236, and judgment is not ordered. *Archer* v. *Eldredge*, 204 Mass. 323, 327.

Exceptions sustained.

The case was argued at the bar in March, 1913, before *Rugg*, C. J., *Morton*, *Loring*, *Sheldon*, & *De Courcy*, JJ., and afterwards was submitted on briefs to all the justices.

E. K. Arnold, for the defendants.

J. P. Walsh, (*C. J. Muldoon, Jr.*, with him,) for the plaintiff.

HELEN DELANEY *vs.* BERKSHIRE STREET RAILWAY COMPANY.

Berkshire. September 9, 1913. — October 22, 1913.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DE COURCY, JJ.

Practice, Civil, Exceptions, Conduct of trial: judge's charge, argument to jury. *Witness*, Disclosure of names.

In refusing to sustain an exception to the refusal of a presiding judge to give an instruction to the jury in the language requested although he gave it in substance, it was *said*, that the degree of amplification with which an applicable principle of law shall be stated to a jury as well as its phraseology rests almost wholly in the discretion of the presiding judge.

Where the defendant in an action of tort for personal injuries has waived a motion, which it had filed under St. 1911, c. 593, that the plaintiff should be compelled to disclose the names of his witnesses, upon an agreement of the plaintiff's counsel to furnish their names, and the plaintiff's counsel in furnishing the names has omitted one of them through an innocent inadvertence, it is proper for the presiding judge to rule that the defendant's counsel in his argument to the jury cannot comment upon the omission.

In an action of tort against a street railway company for personal injuries, where there is no question in regard to a failure of either party to produce evidence within his or its exclusive knowledge or control and where the plaintiff's counsel has not referred to the opportunity of the defendant to produce more witnesses than the plaintiff, it is proper for the presiding judge to refuse to allow the counsel for the defendant in his argument to the jury to refer to St. 1911, c. 593, which authorizes the court to compel either party upon terms to disclose the names and addresses of its witnesses.

RUGG, C. J. This is an action of tort for personal injuries received by a traveller with a horse and vehicle upon the highway through an alleged collision with a car of the defendant. The evidence was conflicting. There was some which tended to show that

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the horse driven by the plaintiff showed no sign of fright or escape from control until it jumped in front of the car when almost alongside. There was other testimony from which it might have been found that the horse and attached vehicle were so near the track that the motorman, if looking, must have seen the danger of a clash for a considerable distance before he reached the place where it occurred. The judge* ruled that there was no evidence that the uneasiness or fright of the horse was caused by the car.

1. Upon this state of the evidence the defendant presented several requests for rulings to the effect in substance that the motorman was not required in the exercise of due care to stop his car or slacken its otherwise reasonable speed until the action of the horse was such as to afford ground for reasonable apprehension that unless he did so a collision would ensue, nor to assume that an apparently gentle horse under control suddenly would jump in front of the car or become unmanageable. These requests were applicable to the evidence and sound in law. But the judge was not obliged to adopt them in the words presented. It was enough if he gave them in substance. This was done by the instruction: "If a team is being driven along outside of the line of the electric car and there is nothing to show that it is likely to turn and nothing to call the motorman's attention to the possibility that it will turn, and he is running his car at a reasonable speed, in reasonable control, and suddenly without any warning, and before he has time to stop, the horse turns or is turned in front of his car, you could not say that he was careless." The degree of amplification with which a governing principle of law shall be stated in a charge to the jury, as well as its phraseology, rests almost wholly in the discretion of the judge. The record shows no error in this regard.

2. The defendant waived a motion which it had filed under St. 1911, c. 593, that the plaintiff disclose the names of her witnesses, upon agreement by her counsel to furnish them, but by oversight of the plaintiff's counsel, (as the judge found without objection upon statements made to him) the name of one was omitted. Under these circumstances the judge rightly ruled that the defendant's counsel could not comment upon the incident. An innocent

* *Sanderson*, J.

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inadvertence of the attorney touching such a matter under the conditions disclosed afforded no just foundation for argument upon the merits of the issues.

3. The defendant excepted to the refusal of the judge to allow its counsel in his closing argument to the jury to refer to St. 1911, c. 593, which authorizes the court to compel either party upon terms to disclose the names and addresses of its witnesses "if justice seems to require it . . . where the names of witnesses are in the exclusive possession of one party to the action." There is nothing in the exceptions to show that this argument would have been pertinent to the issue. It did not relate to any evidence in the case nor to the failure of either side to produce evidence within his exclusive control or knowledge. The only ground upon which it now is sought to sustain the propriety of such an argument is that frequently in actions for personal injury against a street railway company it is urged by the plaintiff's counsel that the defendant is in a position to produce more witnesses in support of its contention than is the plaintiff, and that this fact should be borne in mind in weighing evidence, and hence that it is legitimate for the defendant to refer to the statute as putting parties on an equal basis in this respect. But it does not appear that such suggestion was made in behalf of the plaintiff in the case at bar. Cases are to be tried upon the evidence and not upon unsupported innuendoes as possible reasons why more or less witnesses are called on the one side or the other.

4. The other exceptions taken by the defendant have not been argued and are treated as waived.

Exceptions overruled.

The case was submitted on briefs.

H. W. Ely & J. B. Ely, for the defendant.

C. P. Niles, J. W. Lewis & F. M. Myers, for the plaintiff.

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JENNIE STONE *vs.* GERTRUDE E. LEWIS & another.
JOSEPH STONE *vs.* SAME.

Suffolk. March 10, 1913. — June 18, 1913.*

Present: RUGG, C. J., HAMMOND, LORING, SHELDON, & DE COURCY, JJ.

Negligence, Of one in control of real estate. *Nuisance. Landlord and Tenant.*

The owner of a building, which is constructed without any provision for artificial light, who has let it to a tenant under a lease giving the tenant control of the halls and stairways and providing that repairs shall be made by the tenant, is not liable to a subtenant, or to one coming by rightful invitation to a room hired by such subtenant, for personal injuries from falling down a staircase by reason of the darkness of a hallway in the building.

TWO ACTIONS OF TORT, the first by a married woman for personal injuries, and the second by her husband for loss of service and expenses suffered and incurred by reason of the same injuries, both against Gertrude E. Lewis, as owner and lessor, and James D. Russo, as occupant and lessee of the premises numbered 104 and 106 on Essex Street in Boston, the injuries of the plaintiff in the first case being alleged to have been sustained on October 31, 1908, between four and five o'clock in the afternoon, by falling down a flight of stairs when that plaintiff had come from a room on the third floor of the building that was sublet to the Printing Pressmen's Union, of which that plaintiff's husband was a member, where she had been to pay her husband's dues, and the fall being alleged to have been caused by the darkness of the narrow hallway on which the door of the office of the Union opened. Writs in the Municipal Court of the City of Boston dated December 3, 1910.

On appeal to the Superior Court the cases were tried before *Hitchcock*, J. The facts shown by the evidence are stated in the opinion. At the close of the evidence the defendant Lewis asked the judge to make the following rulings, besides two others which were made by him:

* This case is printed out of its order by reason of a temporary withdrawal of the opinion.

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"1. That upon all the evidence the plaintiff is not entitled to recover.

"2. If the entire premises were leased under a written lease for a term of years and the alleged accident occurred during the continuance of that lease and it appears thereby that the tenant was to make all repairs, the defendant Lewis could not be held liable under this action for an injury occurring, as in this case alleged, during the continuance of that lease."

"5. The ruling of law is applicable in this case that, the property having been leased by the defendant Lewis and all repairs to be made by the lessee places the property wholly under the control, management and supervision of the lessee, and, [the lessee] being such exclusive occupant, the defendant Lewis cannot be held liable to the plaintiff for the injury complained of in this case.

"6. The plaintiff must prove that she was upon the premises lawfully and by the invitation, allurement and inducement of the defendants or either of them.

"7. If the jury find that the defect complained of was a proper part of the legitimate architectural structure of the building and properly made and constructed at the time the building was built and the building has remained in substantially the same condition as when constructed, in the use of the building the defendant Lewis or the defendant Russo can neither be said to have been negligent in the use of said building.

"8. The jury would not be warranted in finding that the defect complained of constituted a nuisance.

"9. Upon all the evidence the plaintiff has not proven negligence upon the part of the defendant Lewis nor shown any lack of duty upon her part which the defendant Lewis owed the plaintiff."

The judge refused to make any of these rulings, and submitted the cases to the jury with other instructions.

The jury returned a verdict for the defendant Russo in each of the cases, and against the defendant Lewis returned a verdict for the plaintiff in the first case in the sum of $650 and a verdict for the plaintiff in the second case in the sum of $175. The defendant Lewis alleged exceptions to the refusal of the rulings requested by her as stated above, but no exception to any part of the charge given.

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G. L. Mayberry, for the defendant Lewis.

S. Bates, for the plaintiffs.

RUGG, C. J. The female plaintiff (who will hereafter be referred to as the plaintiff) seeks to recover for personal injuries sustained by her, and her husband for expenses incurred by him arising out of the same injury. There was evidence tending to show that the plaintiff, in descending the stairs from a room in a building on Essex Street in Boston, whither she had gone in the dusk of a closing day to pay dues to a society, fell by reason of the absence of artificial light in the hallway. None was provided for in the structure of the building. The building was owned by the defendant Lewis, but was leased wholly by the defendant Russo. The condition of the stairs and hallways had remained in this respect the same during the period of two successive leases from Lewis to Russo, covering nearly ten years. The lease provided that repairs should be made by the lessee. There was evidence tending to show that the building had at first been rented by Russo for tenements for living purposes, but more recently a part had been used for business purposes, one of the tenants being the society to whose room the plaintiff had been on the day of the accident. No request had ever been made of the defendant to change the condition of the halls or stairways as to artificial light. The question is whether there is any evidence upon which to ground liability of the defendant Lewis.

When the landowner has given up entire control of premises to a lessee, "this court has never gone further than to hold [him] liable when the use from which the damage or nuisance necessarily ensues was plainly contemplated by the lease." *Clifford* v. *Atlantic Cotton Mills*, 146 Mass. 47, 49. *Taylor* v. *Loring*, 201 Mass. 283, 285. The only basis for charging the defendant Lewis with negligence is that it may be found to be a nuisance to make no provision for artificially lighting the hallway. It hardly could be contended that as between the owner and the lessee there was any obligation implied by law on the former to light the stairways in the absence of any express contract. It is a familiar principle of the law of landlord and tenant that the latter takes the premises as he finds them, in the absence of fraud or misrepresentation or concealed defects as to which the landlord owes a duty of information. *Hawkes* v. *Broadwalk Shoe Co.* 207 Mass.

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117. *Bowe* v. *Hunking*, 135 Mass. 380. *Roche* v. *Sawyer*, 176 Mass. 71. In the case at bar the lack of provision for artificial lighting was a part of the construction of the building and was perfectly obvious and must have been well understood by both the defendants and all subtenants. The same principle applies to the relation between Russo as lessee of the entire building and the society to which he had rented the room from which the plaintiff was coming at the time of her injury. If the plaintiff in this regard has only the same right of recovery for negligence that the tenant whose room she visited would have had there is no liability. The right of the plaintiff as one of the general public coming to the building under the limited invitation held out by reason of the character of the building was no broader than the obligation assumed by the landlord expressly or by fair intendment. There was no change in the premises in the respect which caused the injury to the plaintiff at any time. There was no ground for recovery by reason of negligent maintenance or care of the premises. They continued to be in the same condition as when originally leased. Failure to furnish artificial light when this is due to the construction of the building has never been held to be a nuisance nor to establish liability of the landlord in the absence of express contract or a statutory requirement or circumstances plainly implying assumption of a duty to light. *Jordan* v. *Sullivan*, 181 Mass. 348. *McGowan* v. *Monahan*, 199 Mass. 296. *Dean* v. *Murphy*, 169 Mass. 413. *Hutchinson* v. *Cummings*, 156 Mass. 329, 330. *Gleason* v. *Boehm*, 29 Vroom, 475. *Hilsenbeck* v. *Guhring*, 131 N. Y. 674. *Capen* v. *Hall*, 21 R. I. 364. In the case at bar it is clear that the defendant Lewis never undertook to regain control of the lighting arrangement or to make any provision therefor. The structure of the building forbids the implication of assumption of any duty in this regard. *Marwedel* v. *Cook*, 154 Mass. 235, relied on by the plaintiff, is clearly distinguishable in that there the defendants, who were the owners of the building, reserved to themselves the general lighting arrangements of the halls and passageways and provided means for artificial light which were not in use at the time of the accident, a failure which might have been found to be negligence. The same is true of *Faxon* v. *Butler*, 206 Mass. 500. In *Toland* v. *Paine Furniture Co.* 179 Mass. 501, the want of light was the fault of the person inviting the plaintiff to the premises to do business

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with it. In a case like the present the duty to light common passageways cannot be said as matter of law to be cast upon the landlord or one standing in his shoes. In the absence of some definite obligation to that end, it must be assumed that the rent to the tenant was fixed upon the basis of unlighted passageways.

It follows that a verdict should have been directed in favor of the defendant Lewis. *Green* v. *Pearlstein*, 213 Mass. 360.

Exceptions sustained.

JOHN C. GRAY & another, executors, *vs.* INHABITANTS OF LENOX.

Berkshire. September 9, 1913. — October 22, 1913.

Present: RUGG, C. J., MORTON, BRALEY, SHELDON, & DE COURCY, JJ.

Executor and Administrator. Tax, Assessment.

An ancillary administrator, appointed in another State to administer the estate in that State of a testator whose domicil at the time of his death was in this Commonwealth and whose will was proved here, is in no sense the agent of the executor of the will in this Commonwealth, and within the jurisdiction of his appointment his authority is independent and exclusive.

Notes secured by mortgages of land in another State, which on the first day of April of a certain year are in the possession of an ancillary administrator appointed in such other State to administer the estate in that State of a testator, whose domicil was in this Commonwealth and whose will was proved here, lawfully cannot be assessed for taxation to the executor of the will in this Commonwealth.

The provision of St. 1909, c. 490, Part I, § 23, cl. 7, that personal property of a deceased person shall be assessed to the executor or administrator for three years or until it has been distributed and notice of such distribution has been given to the assessors, has no application to property which is not within the ownership, possession or control of the executor.

PETITION under St. 1909, c. 490, Part I, § 77, filed in the Superior Court on May 6, 1912, by the executors of the will of Grace M. Kuhn, late of Lenox, who died on October 7, 1908, appealing from the refusal of the assessors of the respondent to abate a tax upon certain personal property assessed to the petitioners for the year 1910 on March 15, 1912, and which they had not paid, the said property on April 1, 1910, having been in the possession of Francis W. Rawle, the ancillary administrator of the estate of

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the testatrix in the State of Pennsylvania appointed by a court of that State.

The case was submitted to *Irwin*, J., upon the pleadings and an agreed statement of facts. The judge ordered that the assessment made by the assessors of the respondent on March 15, 1912, and the interest and other charges thereon be abated, and at the request of the parties reported the case for determination by this court.

The case was submitted on briefs.

C. E. Hibbard, C. L. Hibbard & Roland Gray, for the petitioners.

G. A. Mole & F. R. Shaw, for the respondent.

De Courcy, J. The sole question involved in this case is whether the petitioners, as executors of the will of Grace M. Kuhn, late of Lenox, were taxable in 1910 on certain notes made by residents of Pennsylvania and secured by mortgages of land in Philadelphia. At the death of Mrs. Kuhn in October, 1908, these notes were owned by her, and were in Pennsylvania in the possession of W. B. Rawle, her agent. On June 15, 1909, Francis W. Rawle, a resident of Pennsylvania, was appointed ancillary administrator in that State of the estate of Mrs. Kuhn; and on or about that date the notes and mortgages were turned over to him by W. B. Rawle. All payments on the notes were made to the ancillary administrator from that time until his final account was allowed and an order of distribution was made by the Orphans' Court for Philadelphia on November 10, 1910.

The respondent contends that the notes in question were taxable here to the petitioners as personal property of inhabitants of the Commonwealth. St. 1909, c. 490, Part I, § 2. It is clear from the agreed facts, however, that the Massachusetts executors had no legal or equitable title to the property on April 1, 1910, the date fixed for the assessment of taxes. St. 1909, c. 440, §§ 1, 9. At that time the notes were in the possession of the ancillary administrator in Pennsylvania; and as he was duly appointed under the authority and jurisdiction of the State where the property was found, and the notes came to his hands by virtue of such appointment, he acquired the full and exclusive title to them, under the long established rule of the common law. *Stevens* v. *Gaylord*, 11 Mass. 256. *Putnam* v. *Middleborough*, 209 Mass. 456. He was in no sense the agent of the executors here. His authority was inde-

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pendent and exclusive within the jurisdiction of his appointment. *Low* v. *Bartlett*, 8 Allen, 259. *Merrill* v. *New England Mutual Life Ins. Co.* 103 Mass. 245, 249. The petitioners had no right to demand from him the notes, or even the balance of the proceeds thereof after the payment of local creditors. It rested in the discretion of the Orphans' Court to order him either to transmit such balance to the executors or to distribute it directly to legatees. *Norton* v. *Palmer*, 7 Cush. 523. *Welch* v. *Adams*, 152 Mass. 74. *Putnam* v. *Middleborough*, 209 Mass. 456. It appears by the following extracts from the agreed facts that such also was the law in Pennsylvania: "No executor or administrator not appointed as such by a court of Pennsylvania could legally discharge, release or assign any mortgage of lands in Pennsylvania, the mortgage title to which was in his testator at his testator's death, nor sue in Pennsylvania on any notes or debts owned by said testator at his death; and if there was an executor or administrator appointed by Court of Pennsylvania no other executor could lawfully demand or receive payment of principal or interest from any debtor, resident in Pennsylvania, of the estate of such decedent, or give a valid release or discharge to such debtor, or lawfully intermeddle with any property of such estate within the jurisdiction of the State of Pennsylvania." "Every administrator must give bond with sureties to perform his duties as administrator; and an administrator there appointed cannot be compelled to distribute or pay over the funds of the estate collected by him within less than one year from the date of his appointment; nor can he do so except at the risk of himself and of the sureties on his probate bond." "An ancillary administrator, after the expiration of one year as aforesaid, is not obliged to remit the net funds of the estate to the domiciliary executor or administrator; but it rests in the discretion of the court by which he was appointed either to order him to transmit such funds to the domiciliary executor or to order him to distribute them directly to the legatees or next of kin."

The respondent contends however that if the notes were not assessable to the petitioners as owners the tax was valid under clause 7 of St. 1909, c. 490, Part I, § 23, which provides that personal property of deceased persons shall be assessed to the executor or administrator for three years or until it has been distributed

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and notice of such distribution has been given to the assessors. See *Sears* v. *Nahant, ante,* 329. In our opinion the facts do not bring the case at bar within the letter or spirit of that statute. Its language and history indicate that the purpose of the Legislature in allowing the assessors to tax an executor on property that has been distributed by him, if he has failed to give notice of such distribution, is to secure a full disclosure of the facts. See *Vaughan* v. *Street Commissioners,* 154 Mass. 143. Here the petitioners never had the ownership or possession of the notes, nor control of their distribution; in fact had no official means of knowing their value on April first, or when or to whom they would be distributed by the ancillary administrator who had exclusive charge of them. It is not necessary to consider what title, if any, the executors had before the appointment of the ancillary administrator, or whether the notes were properly included in their inventory and in the list of property of the estate taxable to them in 1909. Any and all right they may have had in the notes was extinguished on the appointment of such administrator, not by any distribution, but by operation of law without the consent or co-operation of the petitioners. There is no suggestion of collusion. Notice to the assessors of the appointment of the ancillary administrator was given by the executors when they duly filed their sworn list of the property of the estate in their hands on April 1, 1910. The petitioners even requested the ancillary administrator to pay the funds to them as soon as he could collect them, but he declined to part with the funds until he had settled his account in the Pennsylvania court, especially for the reason that the surety on his bond refused to allow him to pay over sooner.

On the facts agreed upon we are of opinion that the petitioners were not taxable on the notes in question for the year 1910, and that the tax assessed by the town of Lenox and the interest and other charges thereon should be abated; and it is

Ordered accordingly.

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In an action for the obstructing of a natural watercourse in the course of certain grading work on the defendant's land, there was evidence that the work was done by a contractor and a subcontractor, but it was held that the evidence warranted a finding that the defendant had retained a directory control over the manner in which the grading was done, so that the defendant could be found liable for the damage caused by the obstruction. *Christiansen* v. *Lannin*, 322.

One who, after having acted as an agent in charge of real estate of a certain person, continues in charge of it for such person's heirs, and whose claim for services against the ancestor has become barred by the statute of limitations, has no right to deduct the amount of the claim so barred from rents collected from the real estate which have come into his possession while acting as agent for the heirs. *Stevens* v. *Baker*, 30.

Scope of Authority.

Evidence, which was held not to warrant a finding that the agent in this Commonwealth of an insurance company incorporated in another State had authority, without instructions from the home office, to waive a provision of a policy providing that no legal proceedings should be commenced under the policy until after three months from the filing of a proof of loss. *Thomson* v. *American Fidelity Co.* 460.

While a merchandise broker, who has negotiated a sale between a seller and a buyer of goods, is authorized by virtue of his employment to write out and sign bought and sold notes as memoranda of the agreement to make it binding under R. L. c. 74, § 5, he has no authority as broker to make a contract in writing for the parties. *Hobart* v. *Lubarsky*, 528.

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An action for the non-delivery of goods therefore cannot be maintained against the alleged seller of the goods upon a sold note signed in his behalf by a broker, which is declared upon as a contract in writing. *Hobart* v. *Lubarsky*, 528.

If the buyer in such case has a remedy, it is by an action on the oral agreement, of which the sold note must be alleged to be a memorandum, and the plaintiff in order to recover must show that the defendant authorized the broker to make in his behalf the oral contract of sale which the plaintiff alleges was broken. *Ibid.*

Scope of authority of officers and agents of municipal corporations, see MUNICIPAL CORPORATIONS, *Officers and Agents.*

Agent's Commission.

In a suit in equity by an automobile dealer against an automobile manufacturer founded on the breach of a contract in writing, whereby the defendant made the plaintiff the exclusive agent for the sale of its automobiles within a certain territory and agreed not to sell its automobiles within that territory except to the plaintiff, it appeared that the plaintiff was entitled to receive a commission of twenty per cent on the list price on all sales made by it, and it was held that, upon the defendant selling taxicabs to customers introduced by the plaintiff at a reduced price, the plaintiff became entitled to a commission of twenty per cent of the list price, diminished by the amount of the expense which the plaintiff would have incurred if it had made the sales. *Wier* v. *American Locomotive Co.* 303.

Contract of Exclusive Sales Agency.

In a suit in equity by an automobile dealer against an automobile manufacturer, founded on the alleged breach of a contract in writing giving the plaintiff the exclusive right to sell the defendant's automobiles in certain counties of the Commonwealth, a finding of the judge who heard the suit, that the word "automobiles" as used in the contract included taxicabs and was so understood and intended by the parties, was held not to be plainly wrong. *Wier* v. *American Locomotive Co.* 303.

In the same suit it appeared that the plaintiff was entitled to receive a commission of twenty per cent on the list price on all sales made by it and it was held that, upon the defendant selling taxicabs to customers introduced by the plaintiff, at a reduced price, the plaintiff became entitled to a commission of twenty per cent of the list price, diminished by the amount of the expense which the plaintiff would have incurred if he had made the sales. *Ibid.*

In the same suit in equity a further finding of the trial judge that, although the plaintiff had made no attempt to collect commissions on sales of taxicabs by the defendant before the bringing of the suit, yet neither the plaintiff nor its officers or agents ever had waived its right to such commissions, was held not to have been plainly wrong. *Ibid.*

And the same decision was reached as to a finding that the plaintiff was not guilty of laches in the enforcement of its claim against the defendant. *Ibid.*

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Independent Contractor.

In an action for the obstructing of a natural watercourse in the course of certain grading work on the defendant's land, there was evidence that the work was done by a contractor and a subcontractor, but it was held that the evidence warranted a finding that the defendant had retained a directory control over the manner in which the grading was done, so that the defendant could be found to be liable for the damage caused by the obstruction. *Christiansen* v. *Lannin*, 322.

Employer's Liability.

See that subtitle under NEGLIGENCE.

Workmen's Compensation Act.

See that title.

ANIMAL.

Negligence in use of a "green horse." *Raymond Syndicate* v. *American Express Co.* 140.

APPEAL.

See that subtitle under EQUITY PLEADING AND PRACTICE; PRACTICE, CIVIL; LAND COURT; PROBATE COURT.

ARCHITECT.

The objection, that a provision in a building contract, which makes the issuing of the final certificate by the architect conclusive as to the performance of the contract, is void as an attempt to oust the courts of their jurisdiction, is not open after the decision of the architect has been made and the parties have been notified of it without previous objection from either of them. *Hathaway* v. *Stone*, 212.

Construction of a building contract which contained many provisions making the architect a *quasi* arbitrator to determine whatever questions should arise as to the details of the work to be done and the quality of materials to be furnished, from which it was held that, except as to matters for which determination by a board of arbitrators was provided, the certificate of the architect, made in good faith, as to the amount due upon the final payment was conclusive between the parties. *Ibid.*

ASSAULT AND BATTERY.

Certain release under seal which was held to cover a claim for damages for assault and battery. *Carr* v. *Weiss*, 532.

ASSESSMENT.

See that subtitle under TAX.

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ATTACHMENT.

By the provisions of R. L. c. 170, § 1, a foreign corporation, like a natural person not an inhabitant of this Commonwealth, cannot be sued in this Commonwealth unless it has been served with process within the Commonwealth or unless an effectual attachment of its property within the Commonwealth has been made upon the original writ. And, where there has been no such service or attachment, jurisdiction cannot be acquired by a subsequent attachment made by supplementary process under R. L. c. 167, § 80. *Roberts* v. *Anheuser Busch Brewing Co.* 341.

ATTEMPT TO COMMIT CRIME.

The statutes of this Commonwealth providing for the punishment of the crime of attempting to commit a crime give no undue discretionary power to the courts in regard to fixing the penalty. *Kelley* v. *Commonwealth*, 209.

As to sentence for an attempt to commit larceny from the person, see *Ibid.*

ATTEMPT TO COMMIT LARCENY FROM THE PERSON.

One who was indicted in the Superior Court for an attempt to commit larceny from the person, if he is convicted, can be sentenced under R. L. c. 215, § 6, cl. 2, to confinement at hard labor in a house of correction for a term of thirty months, although, if his prosecution had been begun by a complaint in a police, district or municipal court, he must have been sentenced under cl. 3, which restricts the punishment to imprisonment in jail for not more than one year or a fine of not more than $300. *Kelley* v. *Commonwealth*, 209.

ATTORNEY AT LAW.

Rule 3 of the Superior Court, which prescribes that the right of an attorney to appear shall not be questioned by the opposite party unless the objection be taken in writing within ten days after his appearance, has the force of law in proceedings in that court. *Norwood* v. *Dodge*, 351.

In an action of tort, by an attorney at law against the publisher of a newspaper for an alleged libel in publishing an article naming the plaintiff as one of several persons indicted and arrested for conspiracy to defraud and identifying him by description, it is no defense that the defendant by an honest mistake referred to and described the plaintiff instead of another person of a similar name, that the defendant exercised reasonable care and diligence in trying to ascertain the facts before publishing the report and that the mistake occurred in spite of such care and diligence. *Sweet* v. *Post Publishing Co.* 450.

Whether evidence of such care and diligence would be admissible in mitigation of damages was not considered. *Ibid.*

Damages in such case. *Ibid.*

AUDITA QUERELA.

Audita querela is a common law writ, and, by R. L. c. 192, § 1, the rules of practice applicable to it are those prevailing in actions at law. Thus the

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findings of fact made by a judge of the Superior Court at the trial of such a writ are not to be revised, if there is any evidence to warrant them. *Parker* v. *Murphy*, 72.

Audita querela, in which the plaintiff contended that he was entitled to have proceedings on an execution in an action at law against him enjoined because of a discharge in bankruptcy and it was held that the burden was upon him to prove that the plaintiff in the action at law received notice of the pendency of the bankruptcy proceedings in season to prove his claim therein and to object to a discharge, and that a finding of a judge that such burden had not been sustained was warranted. *Ibid.*

Where such plaintiff, after the service of the writ in the action at law upon him, filed a petition in bankruptcy and was adjudicated a bankrupt but did not set up the pendency of the bankruptcy proceedings in that action or seek a postponement thereof pending his discharge in bankruptcy, it was said that it was doubtful whether he could maintain a writ of audita querela to prevent the enforcement of an execution issuing on a judgment issued in the action at law. *Ibid.*

AUTOMOBILE.

In a suit in equity by an automobile dealer against a manufacturer to enforce a contract whereby the plaintiff was appointed the defendant's exclusive agent in a certain territory, findings of a judge as to the meaning of the word "automobile" as used in the contract, and as to whether the plaintiff had waived a certain provision of the contract, or had been guilty of laches, were held not to have been clearly wrong. *Weir* v. *American Locomotive Co.* 303.

Proper assessment of damages for the breach of the contract by the defendant. *Ibid.*

Action of tort for damages resulting from a collision of automobiles of the plaintiff and of the defendant in Vermont, at the trial of which it appeared that, in violation of statutes of Vermont, the plaintiff's automobile was not registered and its operator was not licensed, and it was held that, in the absence of evidence of the common law of Vermont as to the effect of a violation of such statutes, it would be presumed to be the same as that of this Commonwealth. *Holden* v. *McGillicuddy*, 563.

BAGGAGE.

Money, not intended for travelling expenses, in a handbag carried by a passenger in a railroad train is not baggage for the loss of which the corporation operating the railroad is liable. *Whitcomb* v. *New York, New Haven, & Hartford Railroad*, 440.

BANK.

The time within which a certificate of deposit (using that term in its proper sense) should be returned to the bank which issued it and a demand for its payment should be made is the time limited for the bringing of an action upon it against the bank. *Pierce* v. *State National Bank*, 18.

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Whether the time within which an action upon a certificate of deposit (using that term in its proper sense) should be brought against the bank which issued it is twenty years, as prescribed by R. L. c. 202, § 1, cl. 2, or six years, as prescribed by § 2 was not decided. *Pierce* v. *State National Bank*, 18.

If a check payable to the order of a town is indorsed in blank in the name of the town by the treasurer of the town and is deposited in a bank by one of the bank's customers not connected with the town, this is notice to the bank of a defect in the title of the depositor. *Franklin Savings Bank* v. *International Trust Co.* 231.

If such bank pays out the proceeds of the check upon drafts of the depositor and the town receives no part of such proceeds, this is a conversion for which the bank is liable to the drawer of the check. *Ibid.*

BANKRUPTCY.

Before the enactment of St. 1913, c. 656, a mortgage of personal property, made by a bill of sale absolute in form but intended as security, was not required by R. L. c. 198, § 1, to be recorded, and consequently was not included in the provision of the bankruptcy act as amended by U. S. St. 1903, c. 487, § 13, that the period within which a transfer may constitute a preference "shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required." *Coggan* v. *Ward*, 13.

Rights of a mortgagee of personal property under an unrecorded instrument of transfer absolute in form, which was executed and delivered in good faith more than four months before the filing by the mortgagor of a voluntary petition in bankruptcy, upon his taking possession of the mortgaged property less than one month before the filing of such a petition when he has reasonable cause to believe that the mortgagor is insolvent. *Ibid.*

Audita querela, in which the plaintiff contended that he was entitled to have proceedings on an execution in an action at law against him enjoined because of a discharge in bankruptcy and it was held that the burden was upon him to prove that the plaintiff in the action at law received notice of the pendency of the bankruptcy proceedings in season to prove his claim therein and to object to a discharge, and that a finding of a judge that such burden had not been sustained was warranted. *Parker* v. *Murphy*, 72.

Where such plaintiff, after the service of the writ in the action at law upon him, filed a petition in bankruptcy and was adjudicated a bankrupt, but did not set up the pendency of the bankruptcy proceedings in that action or seek a postponement thereof pending his discharge in bankruptcy, it was said that it was doubtful whether he could maintain a writ of audita querela to prevent the enforcement of an execution issuing on a judgment issued in the action at law. *Ibid.*

BICYCLE.

As to what is negligence and what is due care in the use of a bicycle, see NEGLIGENCE, *In use of Bicycle.*

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BILL OF LADING.

A provision in a bill of lading of goods sent by rail, that "the amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the *bona fide* invoice price, if any, to the consignee . . .)" is not contrary to public policy, and is valid and enforceable. *Coleman* v. *New York, New Haven, & Hartford Railroad*, 45.

Construction of a certain bill of lading, which contained the same provision and was given to a newsdealer for magazines returned by him to a news company, and assessment thereunder of damages for loss of the magazines. *New England News Co.* v. *Metropolitan Steamship Co.* 252.

In an action against a carrier for an alleged conversion of goods, if it appears that the plaintiff was named as consignee in the bill of lading of the goods and that he had possession of the bill of lading, this is evidence of the plaintiff's right to the immediate possession of the goods. *Coleman* v. *New York, New Haven, & Hartford Railroad*, 45.

A railroad corporation was held to have been justified in treating a certain dealer, who was also a commission merchant, as the owner of certain goods because he was named as the consignee in the bill of lading and no other person was named as owner therein, although the goods were shipped to the dealer as a commission merchant, that fact not having been brought to the knowledge of the corporation. *New York, New Haven, & Hartford Railroad* v. *York & Whitney Co.* 36.

Where the consignee of goods sent by rail receives them under a bill of lading, one of the terms of which is that the consignee shall pay the freight at the rate stated, and no special rate is stated, but the bill of lading contains a printed provision that the "property will be carried at tariff rates," receipt and acceptance of the goods under the bill of lading is evidence of an implied promise by the consignee to pay the freight charges established under the interstate commerce act. *Ibid.*

In an action by a railroad corporation against the consignee of goods, who received them from the plaintiff under a bill of lading by which he agreed to pay the freight rates established under the interstate commerce act, to recover a balance of the freight charges, which had not been claimed at the time of the delivery of the goods by reason of an erroneous classification that was not discovered until several months later, the defense of estoppel was held not to be open. *Ibid.*

It also was held that the defendant could not be allowed to reduce the damages by showing in recoupment the effect of the payment of and the receipt given for the wrong rate. *Ibid.*

BILL OF SALE.

Before the enactment of St. 1913, c. 656, a mortgage of personal property, made by a bill of sale absolute in form but intended as security, was not required by R. L. c. 198, § 1, to be recorded, and consequently was not included in the provision of the bankruptcy act as amended by U. S. St. c. 487, § 13, that the period within which a transfer may constitute a preference "shall not expire until four months after the date of the recording

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or registering of the transfer, if by law such recording or registering is required." *Coggan* v. *Ward*, 13.

Rights of a mortgagor of personal property under an unrecorded instrument of transfer absolute in form, which was executed and delivered in good faith more than four months before the filing by the mortgagor of a voluntary petition in bankruptcy, upon his taking possession of the mortgaged property less than one month before the filing of such a petition when he has reasonable cause to believe that the mortgagor is insolvent. *Ibid.*

BILLS AND NOTES.

Consideration.

In an action against a widow on a promissory note signed by her during her husband's lifetime and made payable to the plaintiff, who was her husband's brother, there was evidence warranting findings that the defendant, having property which equitably belonged to her husband, in order to make sure that his children by a former wife should share in this property, at the request of her husband made the note payable to the plaintiff, who agreed to act as trustee for such children, and delivered the note to her husband to be kept by him as the agent of the plaintiff, as such trustee; and it was held that on these facts it could be found that there was a good delivery of the note to the payee and that it was given for a valid consideration. *Crosier* v. *Crosier*, 535.

Validity.

The treasurer of a town has no authority to indorse a check payable to the order of the town except for the purpose of depositing it for collection to the credit of the town. *Franklin Savings Bank* v. *Interstate Trust Co.* 231.

If a check payable to the order of a town is indorsed in blank in the name of the town by the treasurer of the town and is deposited in a bank by one of the bank's customers not connected with the town, this is notice to the bank of a defect in the title of the depositor. *Ibid.*

If such bank pays out the proceeds of the check upon drafts of the depositor and the town receives no part of such proceeds, this is a conversion for which the bank is liable to the drawer of the check. *Ibid.*

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Rights of Holder in Due Course.

In this Commonwealth the holder of a promissory note indorsed in blank by the payee may sue upon it in his own name, although as between himself

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and the indorser he may be bound to account wholly or in part for the proceeds. *Perry* v. *Pye*, 403.

Liability of Indorsers.

In an action brought on behalf of one indorser of a note against one of two other indorsers, the defendant may be allowed to show that the indorsements were for accommodation and that by an oral agreement among the indorsers his liability in no event was to exceed one third of the amount at any time due on the note; and if such an agreement is proved, his liability is governed thereby irrespective of the order in which the indorsers signed the note. *Shea* v. *Vahey*, 80.

If a promissory note is payable to the order of the maker and is indorsed in blank by the maker and by several accommodation indorsers, who orally have agreed among themselves as to the proportions for which they shall be liable in case of a default by the maker, and one of the accommodation indorsers, after a default by the maker, pays the entire amount due on the note to the holder and then writes above the indorsements on the note the words, "Pay to the order of" an agent of such indorser, it seems, that an action in the name of the agent against another of the indorsers cannot be maintained upon the note, the remedy of the indorser who paid being by an action upon the oral agreement of the indorsers for contribution. *Ibid.*

Filling of Blanks.

In a suit in equity by a holder in due course of a promissory note governed by the law of Canada, which had been signed in blank by the defendant as maker, and by him placed in the hands of an agent, who filled in the blanks within the scope of his authority, it appeared that by the law of Canada as proved the note was binding on the maker, and an exception to a finding by a master that the note was binding on the defendant was overruled. *Perry* v. *Pye*, 403.

Certificate of Deposit.

The time within which a certificate of deposit (using that term in its proper sense) should be returned to the bank which issued it and a demand for its payment should be made is the time limited for the bringing of an action upon it against the bank. *Pierce* v. *State National Bank*, 18.

Whether the time within which an action upon a certificate of deposit (using that term in its proper sense) should be brought against the bank which issued it is twenty years, as prescribed by R. L. c. 202, § 1, cl. 2, or six years, as prescribed by § 2 was not decided. *Ibid.*

Note under Seal.

A promissory note under seal, although it is a contract under seal within the meaning of the statute of limitations, is none the less a promissory note and properly is declared upon as such. *Clarke* v. *Pierce*, 552.

A promissory note under seal, although the seal is unnecessary for its validity, is a contract under seal within the meaning of the provision of the statute of limitations contained in R. L. c. 202, § 1, and an action can be brought on it at any time within twenty years after the cause of action accrues. *Ibid.*

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BOND.

The surety on a probate bond is liable jointly with his principal; and, if in an action on the bond no service has been made on the principal and he has not appeared, this does not affect the liability of the surety, who is liable for the default of the principal to the full extent of that default not exceeding the amount of the judgment for the penal sum of the bond. *Harmon* v. *Weston*, 242.

Nature of execution which should issue in case of a judgment for the plaintiff in an action against the surety on a probate bond of a trustee. *Ibid.*

Where, in an action on a probate bond, judgment is entered for the penal sum of the bond with interest thereon, if the amount for which execution properly should issue exceeds such penal sum, the allowance of interest is correct as compensation for the wrongful detention of the money. *Ibid.*

And, even if the amount for which execution is to issue does not exceed such penal sum, it cannot be said that the defendant is harmed by the allowance of interest in the entry of judgment, for he can be held only for the amount for which execution is to issue. *Ibid.*

In an action on a probate bond given by one of two trustees, in which judgment had been obtained against the defendant surety because of a misappropriation of trust funds by the trustee for whom the defendant was surety, it appeared that the two trustees were entitled to the whole income of the trust during their lives, and, because of an agreement as to subrogation made by them with the defendant, it was held that the defendant was subrogated to the rights of the two principals to receive the income from the entire trust fund for the period between the time of the misappropriation and the time of the death of the other trustee, and that, therefore, to avoid circuity of action, the income of the part of the trust fund that had been misappropriated would be regarded as fully accounted for by the trustees, and was not to be included in the amount for which execution was to issue. *Ibid.*

Surety on a probate bond of one of two trustees was held not to have any right in the principal of the trust by reason of subrogation to rights of the other trustee, who had as to the principal merely a power of appointment by will over a certain portion of the principal of the trust. *Ibid.*

The claims of holders of bonds of a street railway company, secured by a mortgage to a trust company, were held rightly to have been given priority, by a receiver appointed in a suit in equity to foreclose the mortgage, over a claim of a second street railway company for an agreed compensation for power, payments of which were two years in arrears, it not appearing that the delay in instituting the foreclosure proceedings was for the purpose of benefiting the mortgagee by the claimant's expenditures. *Old Colony Trust Co.* v. *Medfield & Medway Street Railway*, 156.

BOSTON.

Construction of St. 1902, c. 534, §§ 7, 10, 16, with regard to the computation of the annual rental to be paid by the Boston Elevated Railway Company to the city of Boston for the use of the Washington Street Tunnel. *Boston* v. *Boston Elevated Railway*, 41.

The commissioner of public works of the city of Boston is not required by the

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charter of that city to expend a large sum of money for the purchase of gas lamps and other apparatus for street illumination merely because the money has been appropriated for that purpose by the city council. *Smith* v. *Commissioner of Public Works*, 353.

Writ of mandamus to compel such commissioner to spend the money for the purpose designated properly may be refused if it appears that the commissioner believes on apparently substantial grounds that such an expenditure would be unwise for the city. *Ibid.*

BOSTON ELEVATED RAILWAY COMPANY.

Construction of St. 1902, c. 534, §§ 7, 10, 16, with regard to the computation of the annual rental to be paid by the Boston Elevated Railway Company to the city of Boston for the use of the Washington Street Tunnel. *Boston* v. *Boston Elevated Railway*, 41.

BOUNDARY.

Proof, by use of an ancient plan, of the location of a boundary described in a deed. *Brown* v. *Metcalf*, 289.

BROKER.

In a suit in equity seeking to rescind an exchange of property between the plaintiff and two of the defendants, on the ground that it was procured by the false and fraudulent representations of those two defendants and also of a third defendant, who acted as their broker in the transaction, it was held that the broker, although he took part in the fraudulent representations and could have been held liable for the loss caused by the fraud, did not receive any part of the plaintiff's property of which a reconveyance was sought and was not liable for a sum of money received by another defendant for a part of this property. *Cook* v. *Scheffreen*, 444.

CAMBRIDGE.

Under St. 1907, c. 565, § 3, the mayor of Cambridge, in returning without his approval an order of the board of aldermen granting authority to erect a garage in that city, complies with that statute if he states objections in writing founded on considerations of municipal policy other than "the prevention of fire and the preservation of life," which are named in R. L. c. 104, § 1. *Storer* v. *Downey*, 273.

CARRIER.

Of Passengers.

The phrase, "highest degree of care," which has come to be used commonly as expressing the duty of a common carrier toward its passengers, when accurately analyzed, means only that degree of caution which is reasonable in view of the relation of the parties and the fatal consequences which may ensue from a breach of that duty. By RUGG, C. J. *Buckley* v. *Boston Elevated Railway*, 50.

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While a common carrier of passengers is bound to adopt approved appliances that are in general use and necessary for the safety of passengers, it is not obliged to discard those that always have been found to be adequate and safe merely because they may be a possible source of danger to a passenger who uses them for a purpose for which they were not intended. By De Courcy, J. *Aducci* v. *Boston Elevated Railway*, 336.

Money, not intended for travelling expenses, in a handbag carried by a passenger in a railroad train is not baggage for the loss of which the corporation operating the railroad is liable. *Whitcomb* v. *New York, New Haven, & Hartford Railroad*, 440.

Actions by passengers against street railway and railroad corporations for personal injuries, see appropriate subtitles under Negligence.

Of Goods.

Consignee's rights.

In an action against a carrier for the alleged conversion of goods, if it appears that the plaintiff was named as consignee in the bill of lading of the goods and that he had possession of the bill of lading, this is evidence of the plaintiff's right to the immediate possession of the goods. *Coleman* v. *New York, New Haven, & Hartford Railroad*, 45.

A railroad corporation was held to have been justified in treating a certain dealer, who was also a commission merchant, as the owner of certain goods because he was named as the consignee in the bill of lading and no other person was named as owner therein, although the goods were shipped to the dealer as a commission merchant, that fact not having been brought to the knowledge of the corporation. *New York, New Haven, & Hartford Railroad* v. *York & Whitney Co.* 36.

Damages for non-delivery.

A provision in a bill of lading of goods sent by rail, that "the amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the *bona fide* invoice price, if any, to the consignee . . .)" is not contrary to public policy, and is valid and enforceable. *Coleman* v. *New York, New Haven, & Hartford Railroad*, 45.

In an action against a carrier for the loss of certain bags of periodicals in the hands of the defendant, it appeared that there was a stipulation in the bill of lading that any loss or damage for which the carrier was liable should "be computed on the basis of the value of the property (being the *bona fide* invoice price, if any, to the consignee . . .)" and it was held on the evidence that in effect the periodicals lost in the hands of the defendant were being resold by the plaintiff to the news company at an agreed price, that there was ample evidence that the price stated in an invoice, furnished that company by the plaintiff, was a *bona fide* one, and that the defendant was bound by its agreement contained in the bill of lading to pay damages computed on the basis of that price. *New England News Co.* v. *Metropolitan Steamship Co.* 252.

In the same case it was held, that an allowance for handling the returned goods, agreed upon between the plaintiff and the news company, was not included in the "invoice price" for which the defendant agreed to be liable, and that the plaintiff could not recover it as a part of his damages. *Ibid.*

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In an action by a railroad corporation against the consignee of goods, who received them from the plaintiff under a bill of lading by which he agreed to pay the freight rates established under the interstate commerce act, to recover a balance of the freight charges, which had not been claimed at the time of the delivery of the goods by reason of an erroneous classification that was not discovered until several months later, the defense of estoppel was held not to be open. *New England News Co.* v. *Metropolitan Steamship Co.* 252.

It also was held that the defendant could not be allowed to reduce the damages by showing in recoupment the effect of the payment of and the receipt given for the wrong rate. *Ibid.*

Carrier's charges.

Where the consignee of goods sent by rail receives them under a bill of lading, one of the terms of which is that the consignee shall pay the freight at the rate stated, and no special rate is stated, but the bill of lading contains a printed provision that the "property will be carried at tariff rates," receipt and acceptance of the goods under the bill of lading is evidence of an implied promise by the consignee to pay the freight charges established under the interstate commerce act. *New York, New Haven, & Hartford Railroad* v. *York & Whitney Co.* 36.

Stoppage *in transitu.*

In an action by the consignee of goods against a carrier for their alleged conversion, where it appears that the carrier returned the goods to the consignor, who claimed the right of stoppage *in transitu*, it was held that, on the evidence, the question whether the transit had been terminated by a constructive delivery of the goods to the consignee, so that the right of stoppage *in transitu*, if it existed, had been lost, was a question of fact for the jury. *Coleman* v. *New York, New Haven, & Hartford Railroad*, 45.

The insolvency of a consignee of goods which is necessary to give the consignor the right of stoppage *in transitu* need not be shown by proof of adjudication, but consists simply of inability to pay debts in the usual course of business, and may be proved as a rational inference from convincing facts and circumstances. *Ibid.*

Evidence which, it was held, would warrant a finding that a certain consignee was insolvent. *Ibid.*

CEMETERY.

At the trial of a petition by a cemetery corporation against a town for the assessment of damages for the taking of an easement in a strip of land of the petitioner for the purpose of constructing and maintaining a sewer therein, it is proper for the presiding judge to instruct the jury that, in determining the value of the property taken, they may consider all the uses to which it properly might have been applied if it had not been taken, and that they may take into consideration the adaptability of the land for cemetery purposes. *Holyhood Cemetery Association* v. *Brookline*, 255.

CHARITY.

Proper disposition of a legacy given by will to a private charitable corporation which refuses to accept it. *Read* v. *Willard Hospital*, 132.

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Application of the doctrine of *cy pres* to a devise by a widow of her former residence "for an Old Folks Home, both male and female, of Evangelical Creed," where it appeared that the house given was not suitable for an old folks' home and certain property devoted to the home by the will was insufficient for the purpose. *Norris* v. *Loomis*, 344.

CHILD.

Negligence of.

See NEGLIGENCE, *Of Child.*

CITIES AND TOWNS.

See MUNICIPAL CORPORATIONS.

CIVIL SERVICE.

The preference of veterans provided for in the civil service law is not to be extended by implication from equivocal words of the statute. *Phillips* v. *Metropolitan Park Commission*, 502.

The definition of the word "veteran" in R. L. c. 19, § 20, designating those persons who are entitled to the veterans' preference under the civil service law provided for by that chapter, does not include one who served in the navy of the United States between 1898 and 1903 and for distinguished conduct in the presence of the enemy received a medal of honor from the Secretary of the Navy. *Ibid.*

In St. 1909, c. 188, providing for the retirement and pensioning of members of the police department in cities other than Boston which accept the provisions of the act, there is nothing which confines the giving of pensions to those who have been appointed under the civil service rules. *Moffatt* v. *Mayor of Lowell*, 92.

COMMONWEALTH.

Certain claims for which, it was held, no liens attached against funds retained by the Commonwealth under a contract for the construction of a State highway. *Thomas* v. *Commonwealth*, 369.

COMPROMISE.

Of controversy as to will, see *Parker* v. *New England Trust Co.* 226.

CONFLICT OF LAWS.

The statute of limitations being a matter of remedy, the question whether an action is barred by it is to be determined by the law of the forum. *Clarke* v. *Pierce*, 552.

Action of tort for damages resulting from a collision of automobiles of the plaintiff and of the defendant in Vermont, at the trial of which it appeared that, in violation of statutes of Vermont, the plaintiff's automobile was not registered and its operator was not licensed, and it was held that, in the

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absence of evidence of the common law of Vermont as to the effect of a violation of such statutes, it must be presumed to be the same as that of this Commonwealth. *Holden* v. *McGillicuddy*, 563.

CONSORTIUM.

Where a married woman has recovered judgment against a railroad corporation in an action for personal injuries caused by a collision of trains, her husband, in a subsequent action against the railroad corporation for consequential damages caused to him by her injuries, can recover nothing for loss of consortium. Following Bolger *v.* Boston Elevated Railway, 205 Mass. 420. *Whitcomb* v. *New York, New Haven, & Hartford Railroad*, 440.

CONSPIRACY.

In an action of tort for a wrongful act alleged to have been committed by joint defendants, an allegation of conspiracy does not change the nature of the wrong alleged, but is simply a way of alleging joint action by the defendants. *Perry* v. *Hayes*, 296.

Various matters determined in a suit in equity against a number of defendants, where the bill alleged a conspiracy to defraud the plaintiff. *Warfield* v. *Adams*, 506.

CONSTITUTIONAL LAW.

Eminent Domain.

The interest of the public that the people should be well housed, although proper to be considered in the exercise of the police power, is not a proper subject for the exercise of the right of eminent domain. By RUGG, C. J. *Salisbury Land & Improvement Co.* v. *Commonwealth*, 371.

St. 1912, c. 715, purporting by § 4 to authorize the Salisbury Beach Reservation Commission to take certain land by right of eminent domain as a public reservation and providing in § 10 that "Said commission may sell or lease any lands or rights in land taken or acquired by it, which are not needed as a public reservation," was held to be unconstitutional as an attempt to authorize the exercise of the right of eminent domain in part for a private purpose, and because it was impossible to separate the valid from the invalid portions of the statute. *Ibid.*

Police Power.

The enactment of an ordinance by a city under authority of R. L. c. 104, § 1, providing that "no building shall be erected for or converted to use as a garage unless such use is previously authorized by the board of aldermen," is a valid exercise of the police power which does not exceed the scope of the statute. *Storer* v. *Downey*, 273.

The interest of the public that the people should be well housed, although proper to be considered in the exercise of the police power, is not a proper subject for the exercise of the right of eminent domain. By RUGG, C. J. *Salisbury Land & Improvement Co.* v. *Commonwealth*, 371.

St. 1902, c. 115, providing that a barrel of sweet potatoes shall contain one

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hundred and fifty pounds, is not a regulation of interstate commerce, and is constitutional. *Commonwealth* v. *Gussman*, 349.

St. 1907, c. 394, as amended by St. 1911, c. 163, providing that whoever gives or attempts to give false or insufficient measure shall be punished as there stated, is constitutional, and is not unconstitutional as applies to a sale by insufficient measure of a barrel of sweet potatoes in the original package in which they were brought from another State. *Ibid.*

R. L. c. 121, § 13, re-enacting in substance St. 1886, c. 346, § 4, and providing that "a gas company shall not transfer its franchise, lease its works or contract with any person, association or corporation to carry on its works, without the authority of the General Court," is constitutional. *Attorney General* v. *Haverhill Gas Light Co.* 394.

Trial by Jury.

Constitutional right to a trial by jury in a suit to reach and apply equitable assets in satisfaction of a debt. *Stockbridge* v. *Mixer*, 415.

The provision of St. 1909, c. 236, § 1, that, in a case before this court on an exception by a defendant to a refusal of a presiding judge to order a verdict for such defendant, this court, if the defendant's exception is sustained, may by rescript direct the entry in the trial court of judgment for the defendant, does not violate the right to a trial by jury which is guaranteed by art. 15 of the Declaration of Rights. *Bothwell* v. *Boston Elevated Railway*, 467.

Fair Trial.

Section 1 of St. 1911, c. 433, gives to the Superior Court power to order transferred to the Land Court a writ of entry wrongly begun in the Superior Court in 1909, in which the tenant has appeared, answered and claimed a trial by jury; and such statute is constitutional. *Browne* v. *Browne*, 76.

St. 1912, c. 317, providing that "if the justice who presides at a trial has reserved a case for report to the Supreme Judicial Court, or to the full court, and fails, by reason of physical or mental disability, death or resignation, to make such report, any other justice of the same court may examine and report the same," is constitutional. *Godfrey* v. *Boston Elevated Railway*, 432.

CONTRACT.

Validity.

In an action of contract, the defense, that the contract was invalid because it was made on the Lord's day, cannot be availed of if it is not set up in the answer. *Raymond* v. *Phipps*, 559.

A provision in a bill of lading of goods sent by rail, that "the amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the *bona fide* invoice price, if any, to the consignee . . .)" is not contrary to public policy, and is valid and enforceable. *Coleman* v. *New York, New Haven, & Hartford Railroad*, 45.

The objection, that a provision in a building contract, which makes the issuing of the final certificate by the architect conclusive as to the performance of the contract, is void as an attempt to oust the courts of their jurisdiction, is not open after the decision of the architect has been made and

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the parties have been notified of it without previous objection from either of them. *Hathaway* v. *Stone*, 212.

Construction.

It seems, that in an action to recover damages for the alleged breach of a contract in writing in a foreign language, where there is a dispute between the parties as to the correct translation of the contract, the question, which translation is the correct one, is for the jury. *Soderlund* v. *Helman*, 542.

Construction of a building contract which contained many provisions making the architect a *quasi* arbitrator to determine whatever questions should arise as to the details of the work to be done and the quality of materials to be furnished, from which it was held that, except as to matters for which determination by a board of arbitrators was provided, the certificate of the architect, made in good faith, as to the amount due upon the final payment was conclusive between the parties. *Hathaway* v. *Stone*, 212.

In the construction of a contract in writing between the owner of a patent for a lamp shade for road vehicles and one who agreed to manufacture the shades for one year and to manufacture at least one thousand shades, for which he should pay the owner $1 each, it was held that a provision that $500, deposited by the licensee as security, should be forfeited "as fixed, liquidated and ascertained damages" in case of breach by the licensee, limited the owner's right of recovery to that sum, although the licensee manufactured only twenty-five shades. *Kaplan* v. *Gray*, 269.

In a suit in equity by an automobile dealer against an automobile manufacturer, founded on the alleged breach of a contract in writing giving the plaintiff the exclusive right to sell the defendant's automobiles in certain counties of the Commonwealth, a finding of the judge who heard the suit, that the word "automobiles" as used in the contract included taxicabs and was so understood and intended by the parties, was held not to be plainly wrong. *Wier* v. *American Locomotive Co.* 303.

In the same suit it appeared that the plaintiff was entitled to receive a commission of twenty per cent on the list price on all sales made by it and it was held that, upon the defendant selling taxicabs to customers, introduced by the plaintiff, at a reduced price, the plaintiff became entitled to a commission of twenty per cent of the list price, diminished by the amount of the expense which the plaintiff would have incurred if it had made the sales. *Ibid.*

If the general lessee of an entire building makes an "option agreement" in writing with a sublessee of one floor of the building, that if the general lessee decides to sell his leasehold interest he will notify such sublessee and will give to the sublessee "an opportunity to purchase said leasehold estate, and upon the terms and conditions as fixed by" the general lessee, such general lessee fulfils his obligation to the sublessee by offering in good faith to sell his leasehold interest to the sublessee on specified terms and conditions without having fixed the terms and conditions in any actual or pending bargain with a third person. *Chandler & Co.* v. *McDonald-Weber Co.* 365.

Construction of bills of lading, see *New York, New Haven, & Hartford Railroad* v. *York & Whitney Co.* 36; *New England News Co.* v. *Metropolitan Steamship Co.* 252.

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Contract (*continued*).

Construction of a policy of fire insurance. *Hanley* v. *Ætna Ins. Co.* 425.
Construction of a policy of accident insurance. *Bohaker* v. *Travelers Ins. Co.* 32.

In Writing.

It seems, that in an action to recover damages for the alleged breach of a contract in writing in a foreign language, where there is a dispute between the parties as to the correct translation of the contract, the question, which translation is the correct one, is for the jury. *Soderlund* v. *Helman*, 542.

In an action brought on behalf of one indorser of a note against one of two other indorsers, the defendant may be allowed to show that the indorsements were for accommodation and that by an oral agreement among the indorsers his liability in no event was to exceed one third of the amount at any time due on the note; and if such an agreement is proved, his liability is governed thereby irrespective of the order in which the indorsers signed the note. *Shea* v. *Vahey*, 80.

In an action of contract upon a covenant in a lease in writing to recover rent for an apartment at the rate of $45 a month in accordance with the terms of the lease, the defendant cannot be allowed to show that when the lease was made the plaintiff proposed to let the premises to the defendant in their existing condition for $42 a month, and then orally agreed to build a veranda in consideration of the rent being made $45 a month as inserted in the lease, and that the plaintiff did not build the veranda. *Spear* v. *Hardon*, 89.

The words of a contract in writing, made between the parties to a previous contract in writing for the construction of a building, which recited that a controversy had arisen between the parties as to the amount due upon the previous contract and provided that the contractor should accept and the owner should pay $35,000 in full settlement of all claims, whereof $25,000 should be paid forthwith and the balance should be paid as provided by the terms of the first contract, were held not to be plain as to the conditions governing the payment of the $10,000, so that evidence should have been admitted to show their true meaning as relating to the former contract that had not been completed. *Whidden & Co.* v. *Jordan*, 189.

In an action of contract for a sum of money alleged to be due to the plaintiff, where the sole defense relied upon is a release in writing given by the plaintiff to the defendant and alleged by the defendant to include the plaintiff's present claim, if there is no ambiguity in the terms of the instrument, evidence of what was said in the negotiations that resulted in the execution and delivery of the release, although admitted without objection, cannot be considered in interpreting its meaning, and whether the defendant asked for a "full release" and the plaintiff agreed to give such release is of no consequence. *Rochester Tumbler Works* v. *Mitchell Woodbury Co.* 194.

While a merchandise broker, who has negotiated a sale between a seller and a buyer of goods, is authorized by virtue of his employment to write out and sign bought and sold notes as memoranda of the agreement to make it binding under R. L. c. 74, § 5, he has no authority as broker to make a contract in writing for the parties. *Hobart* v. *Lubarsky*, 528.

An action for the non-delivery of goods therefore cannot be maintained against the alleged seller of the goods upon a sold note signed in his behalf by a broker, which is declared upon as a contract in writing. *Ibid.*

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If the buyer in such case has a remedy, it is by an action on the oral agreement, of which the sold note must be alleged to be a memorandum, and the plaintiff in order to recover must show that the defendant authorized the broker to make in his behalf the oral contract of sale which the plaintiff alleges was broken. *Hobart* v. *Lubarsky*, 528.

In a Foreign Language.

It seems, that in an action to recover damages for the alleged breach of a contract in writing in a foreign language, where there is a dispute between the parties as to the correct translation of the contract, the question, which translation is the correct one, is for the jury. *Soderlund* v. *Helman*, 542.

Implied.

In fact.

Where the consignee of goods sent by rail receives them under a bill of lading, one of the terms of which is that the consignee shall pay the freight at the rate stated, and no special rate is stated, but the bill of lading contains a printed provision that the "property will be carried at tariff rates," receipt and acceptance of the goods under the bill of lading is evidence of an implied promise by the consignee to pay the freight charges established under the interstate commerce act. *New York, New Haven, & Hartford Railroad* v. *York & Whitney Co.* 36.

Building Contract.

The objection, that a provision in a building contract, which makes the issuing of the final certificate by the architect conclusive as to the performance of the contract, is void as an attempt to oust the courts of their jurisdiction, is not open after the decision of the architect has been made and the parties have been notified of it without previous objection from either of them. *Hathaway* v. *Stone*, 212.

Construction of a building contract which contained many provisions making the architect a *quasi* arbitrator to determine whatever questions should arise as to the details of the work to be done and the quality of materials to be furnished, from which it was held that, except as to matters for which determination by a board of arbitrators was provided, the certificate of the architect, made in good faith, as to the amount due upon the final payment was conclusive between the parties. *Ibid.*

For Support.

Evidence which was held to be competent, in an action by a woman for an alleged breach of a contract in writing to furnish her with board and food during her life and also to pay her $10 monthly, as tending to show that the defendant had not furnished the plaintiff with food as he agreed and that the plaintiff was justified in leaving his house and in not going there for food. *Soderlund* v. *Helman*, 542.

Evidence of the fair market price per week of a woman's board was held to be admissible in such action, upon the question of damages, as tending to show the fair value of the food that the defendant failed to furnish. *Ibid.*

Proper instructions for the judge to give to the jury in such action. *Ibid.*

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In such an action it was held to be correct for the presiding judge to refuse to rule that the plaintiff could not recover unless she made a demand on the defendant, because, on proof of the alleged contract, the plaintiff would be entitled to receive $10 a month from the defendant without any demand. *Soderlund* v. *Helman*, 542.

In such an action the defendant is not harmed by the admission of the testimony of a deputy sheriff introduced by the plaintiff to show the service upon the defendant of a demand by the plaintiff's attorney for the payment of all money due under the contract, even if as matter of law no such demand was necessary. *Ibid.*

Performance and Breach.

An injunction, issued on an information filed by the Attorney General under R. L. c. 119, § 19, against a foreign fraternal beneficiary corporation, enjoining it "from prosecuting any business of such corporation within this Commonwealth," excuses the corporation from levying an assessment to procure funds with which to pay a death benefit due by reason of the death of a member after the injunction had issued, although after such death the injunction was modified to permit the corporation to defend actions brought against it and "to pay such claims as are now pending against it." *Moshenz* v. *Independent Order Ahawas Israel*, 185.

If the general lessee of an entire building makes an "option agreement" in writing with a sublessee of one floor of the building, that if the general lessee decides to sell his leasehold interest he will notify such sublessee and will give to the sublessee "an opportunity to purchase said leasehold estate, and upon the terms and conditions as fixed by" the general lessee, such general lessee fulfils his obligation to the sublessee by offering in good faith to sell his leasehold interest to the sublessee on specified terms and conditions without having fixed the terms and conditions in any actual or pending bargain with a third person. *Chandler & Co.* v. *McDonald-Weber Co.* 365.

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Damages.

Damages for breaches of contracts, see DAMAGES, *In Contract.*

CONVERSION.

In an action against a carrier for an alleged conversion of goods, if it appears that the plaintiff was named as consignee in the bill of lading of the goods and that he had possession of the bill of lading, this is evidence of the plain-

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tiff's right to the immediate possession of the goods. *Coleman* v. *New York, New Haven, & Hartford Railroad*, 45.

If a check payable to the order of a town is indorsed in blank in the name of the town by the treasurer of the town and is deposited in a bank by one of the bank's customers not connected with the town, this is notice to the bank of a defect in the title of the depositor, and, if the bank pays out the proceeds of the check upon drafts of the depositor and the town receives no part of such proceeds, this is a conversion for which the bank is liable to the drawer of the check. *Franklin Savings Bank* v. *International Trust Co.* 231.

In an action for the alleged conversion of a diamond ring, where it appeared that the plaintiff had delivered the ring to a conditional purchaser, under a contract by which the title was to remain in the plaintiff until the purchase money was paid and the purchaser until such payment was not to sell or pledge the ring, and that such purchaser, without having paid for the ring, pawned it to the defendant, it was held that a verdict for the plaintiff was warranted by the evidence. *Sallinger* v. *Collateral Loan Co.* 266.

In the same action, instructions to the jury that the burden was upon the plaintiff to show that there had been a default on the part of the purchaser and consequently that at the time of bringing the action the plaintiff had the title to the ring and the right to its possession, and that, if he had such right, he still must prove a demand upon the defendant and a refusal to deliver the ring to the plaintiff, were held to be correct. *Ibid.*

In such an action, an offer to return the ring to the plaintiff at the trial was held not to mitigate damages. *Ibid.*

Evidence, at the trial before a judge without a jury of an action of tort against the owner of a building for the alleged conversion of a ventilator and pipe attached thereto, upon which it was held that the judge could not be required as a matter of law to find and rule that the ventilator and pipe were personal property, and which warranted a finding for the defendant. *Natural Autoforce Ventilator Co.* v. *Winslow*, 462.

CORPORATION.

For Public Service.

A corporation, created by or organized under the laws of this Commonwealth for the purpose of manufacturing and selling gas for light and heat in a certain city, is a public service corporation, and, except by legislative authority, cannot part with its franchise and property in such a way as to deprive itself of the power to perform its public duties. *Attorney General* v. *Haverhill Gas Light Co.* 394.

As was pointed out in Weld *v.* Edison Electric Illuminating Co. 197 Mass. 556, the policy which has been developed in Massachusetts respecting the furnishing of artificial light is that of a regulated monopoly. By RUGG, C. J. *Ibid.*

Foreign.

By the provisions of R. L. c. 170, § 1, a foreign corporation, like a natural person not an inhabitant of this Commonwealth, cannot be sued in this Commonwealth unless it has been served with process within the Commonwealth or unless an effectual attachment of its property within the Com-

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monwealth has been made upon the original writ. And, where there has been no such service or attachment, jurisdiction cannot be acquired by a subsequent attachment made by supplementary process under R. L. c. 167, § 80. *Roberts* v. *Anheuser Busch Brewing Co.* 341.

Upon a petition against a railroad corporation by a foreign manufacturing corporation for damages sustained by the petitioner as lessee of certain land by reason of changes made in the abolition of a grade crossing of the railroad with a private way, it is immaterial that, at the time when the petitioner received its lease, it had not complied with the statutes requiring it to file with the commissioner of corporations, among other documents, an appointment of him as its agent for receipt of service, if it appears that it had complied with such statutes before the decree of court ordering the abolition of the crossing. *Cornell-Andrews Smelting Co.* v. *Boston & Providence Railroad*, 381.

Shares of stock in foreign corporations, owned by a non-resident testator at the time of his death and represented by certificates in a safe deposit box kept by him in this Commonwealth, are not "found here" within the meaning of R. L. c. 143, and need not be administered by an ancillary administrator under the provisions of that statute. *Kennedy* v. *Hodges*, 112.

Suit in equity against the devisees and legatees under the will of a deceased subscriber to shares in a foreign corporation, for the collection of a call upon the shares of the testator, which was held to have been barred because the directors did not, before the settlement of the estate, present their claim to the Probate Court and ask to have funds retained for its satisfaction. *Electric Welding Co.* v. *Fitz*, 315.

Gas Company.

See that title.

Taxation.

The general rule established by St. 1909, c. 440, that all taxes shall be assessed as of April 1, applies to excises on corporate franchises as well as to direct taxes and the deductions should be made as of the same date, so that St. 1912, c. 491, which was approved on April 16, 1912, and provided that it should take effect upon its passage, could not be applied lawfully to an assessment for the excise tax on domestic corporations for the year 1912. *Martin L. Hall Co.* v. *Commonwealth*, 326.

"Cash in bank," consisting of the amount standing to the credit of a domestic business corporation in a national bank or a trust company, is not included in the word "merchandise" nor the word "securities" in the provision of St. 1909, c. 490, Part III, § 43, relating to the excise imposed upon the franchises of such corporations. *Boston Railroad Holding Co.* v. *Commonwealth*, 493.

Rights of Bondholders.

Bill in equity by a holder of bonds of a mining corporation against the directors of the corporation, the corporation and trustees holding the corporation property in mortgage to secure the bondholders' rights, for an accounting as to funds which the plaintiff alleges should be paid to the

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trustees because of waste and strip committed by persons to whom the corporation had let its property. *Young* v. *Haviland*, 120.

Rights of Stockholders.

An individual stockholder in a corporation cannot maintain an action of tort against other stockholders for illegally voting to issue a large number of new shares of stock in the corporation and transferring such shares without consideration to another defendant, thereby diminishing the value of the plaintiff's shares. The remedy for an illegal issue of stock must be enforced by the corporation or by a suit in equity for the benefit of stockholders to compel such enforcement by the corporation. *Perry* v. *Hayes*, 296.

Liability of Stockholders.

In a suit in equity by a foreign corporation under R. L. c. 141, §§ 26, 27, against the devisees and legatees under the will of a deceased subscriber for shares of stock of the plaintiff, for the collection of a call of £1 a share, it appeared that the call had not been made until after the settlement of the estate of the deceased subscriber and after the expiration of the two year period of limitation, and that, before the expiration of such period, the necessity for and probability of a call upon the actual subscribers must have been apparent to the plaintiff's directors, and it was held that the suit could not be maintained because under R. L. c. 141, § 13, the plaintiff's claim could legally have been presented to the Probate Court before the estate was fully administered as one that might become justly due from the estate. *Electric Welding Co.* v. *Fitz*, 315.

Liability of Directors.

A bill in equity, by a holder of bonds of a mining corporation against the directors of the corporation, the corporation and two trustees to whom the corporation has conveyed its property to secure the payment of bonds issued by it, cannot be maintained for an accounting as to funds which the plaintiff alleges should be paid to the trustees because of waste and strip committed by persons to whom the corporation had leased its property, unless the plaintiff proves that a demand was made upon the trustees to act and that they refused or neglected to do so, or unless facts appear which make it plain that such a demand would have been useless. *Young* v. *Haviland*, 120.

Facts which, it was held, were not sufficient to show that it would have been useless to have demanded of the trustees that they take the action which the plaintiff contends they should have taken. *Ibid.*

Facts upon which it was held in the same suit that the directors were not liable. *Ibid.*

CY PRES.

Application of the doctrine of *cy pres* to a devise by a widow of her former residence "for an Old Folks Home, both male and female, of Evangelical Creed," where it appeared that the house given was not suitable for an old folks' home and certain property devoted to the home by the will was insufficient for the purpose. *Norris* v. *Loomis*, 344.

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DAMAGES.

For Property taken or injured under Statutory Authority.

Under R. L. c. 48, § 15, which provides that in estimating the damages to property of a person by the alteration of a highway "regard shall be had to all the damages done to him, whether by taking his property or by injuring it in any manner and there shall be deducted the benefit accruing to such property thereby," a petitioner for damages is required to show that the damages to his property exceed the benefits. *Mitchell* v. *Boston*, 150.

At the trial of such a petition, where the respondent in defense has introduced evidence of benefits to the petitioner's property, it is within the discretionary power of the presiding judge to refuse to allow the petitioner to introduce evidence in rebuttal bearing upon such benefits and tending to diminish their value. *Ibid.*

At the trial of a petition by a cemetery corporation against a town for the assessment of damages for the taking of an easement in a strip of land of the petitioner for the purpose of constructing and maintaining a sewer therein, it is proper for the presiding judge to instruct the jury that, in determining the value of the property taken, they may consider all the uses to which it properly might have been applied if it had not been taken, and that they may take into consideration the adaptability of the land for cemetery purposes. *Holyhood Cemetery Association* v. *Brookline*, 255.

The rules for the assessment of damages, which were declared in Cornell-Andrews Smelting Co. *v.* Boston & Providence Railroad, 202 Mass. 585, and 209 Mass. 298, to be proper to apply in that case, were reaffirmed on exceptions taken by the respondent and an intervening petitioner at a new trial of the case. *Cornell-Andrews Smelting Co.* v. *Boston & Providence Railroad*, 381.

Various rulings as to procedure in a petition by a lessee of land against a railroad corporation for damages resulting from the abolition of a grade crossing of the railroad with a private way, which was the petitioner's only means of going to and from the leased premises, where the lessor was admitted as an intervening petitioner. *Ibid.*

At the trial of such petition it appeared that a new street constructed in the process of such abolition effected a discontinuance of the petitioner's private right of way, and the petitioner claimed damages resulting from the fact that buildings and machinery, which he had placed upon the premises, and his lease were greatly reduced in value or rendered worthless, and he was held not to be limited in his damages to what it would cost to buy land to construct another way, or to the cost of building a way out of his premises, although those were circumstances to be considered in assessing damages. *Ibid.*

In the same case the petitioner was allowed to show, as bearing upon the alleged decrease in the value of the real estate which it held under lease, that dust and dirt came into the factory from the new street after it was completed. *Ibid.*

And the petitioner was held to be entitled to show that, previous to the changes made in the course of such abolition, his property was insurable, and that after the changes it was not insurable. *Ibid.*

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At such trial the petitioner contended and offered evidence tending to show that, by the discontinuance of the private way, operation of its plant was rendered impossible and its machinery and buildings were rendered worthless, and expert witnesses, testifying in its behalf, were asked, and were held rightly to have been permitted to answer questions relating to the existence or non-existence of other factories in New England engaged in rolling, smelting and refining. *Cornell-Andrews Smelting Co.* v. *Boston & Providence Railroad*, 381.

At the trial of a petition for damages resulting from the abolition of a grade crossing of a railroad and a private way, where the value of certain buildings is an issue, an experienced builder who constructed the buildings may be permitted in the discretion of the judge to testify as an expert as to their value at the time of their erection and at the time of the decree of court abolishing the crossing, which was four years later, although he is not acquainted with the value of real estate in the town where they are situated. *Ibid.*

An instruction, at the trial of a petition by a foreign manufacturing corporation for damages resulting to it from the abolition of a grade crossing of a railroad with a private way, to the effect that the foreign corporation was not an inhabitant of the town where its factory was and had no right to petition the selectmen of the town under R. L. c. 48, § 65, for a new private way, was held not to have harmed the respondent because the judge immediately added that the corporation could make such an application to the county commissioners, who had power to deal with it, and fairly left it to the jury to say how far the value of the property and the amount of the damages to be assessed were affected by the possibility of such a way being laid out and constructed. *Ibid.*

In Contract.

A provision in a bill of lading of goods sent by rail, that "the amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the *bona fide* invoice price, if any, to the consignee . . .)" is not contrary to public policy, and is valid and enforceable. *Coleman* v. *New York, New Haven, & Hartford Railroad*, 45.

In an action against a carrier for the loss of certain bags of periodicals in the hands of the defendant, it appeared that there was a stipulation in the bill of lading that any loss or damage for which the carrier was liable should "be computed on the basis of the value of the property (being the *bona fide* invoice price, if any, to the consignee . . .)" and it was held on the evidence that in effect the periodicals lost in the hands of the defendant were being resold by the plaintiff to the news company at an agreed price, that there was ample evidence that the price stated in an invoice, furnished that company by the plaintiff, was a *bona fide* one, and that the defendant was bound by its agreement contained in the bill of lading to pay damages computed on the basis of that price. *New England News Co.* v. *Metropolitan Steamship Co.* 252.

In the same case it was held that an allowance for handling the returned goods, agreed upon between the plaintiff and the news company, was not included in the "invoice price" for which the defendant agreed to be liable, and that the plaintiff could not recover it as a part of his damages. *Ibid.*

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In the construction of a contract in writing between the owner of a patent for a lamp shade for road vehicles and one who agreed to manufacture the shades for one year and to manufacture at least one thousand shades for which he should pay the owner $1 each, it was held that a provision that $500, deposited by the licensee as security, should be forfeited "as fixed, liquidated and ascertained damages" in case of breach by the licensee, limited the owner's right of recovery to that sum, although the licensee manufactured only twenty-five shades. *Kaplan* v. *Gray*, 269.

In a suit in equity by an automobile dealer against an automobile manufacturer founded on the breach of a contract in writing, whereby the defendant made the plaintiff the exclusive agent for the sale of its automobiles within a certain territory and agreed not to sell its automobiles within that territory except to the plaintiff, it appeared that the plaintiff was entitled to receive a commission of twenty per cent on the list price on all sales made by it and it was held that, upon the defendant selling taxicabs to customers, introduced by the plaintiff, at a reduced price, the plaintiff became entitled to a commission of twenty per cent of the list price, diminished by the amount of the expense which the plaintiff would have incurred if he had made the sales. *Wier* v. *American Locomotive Co.* 303.

In an action by a woman for an alleged breach of a contract in writing to furnish her with board and food during her life and also to pay her $10 monthly, evidence of the fair market price per week of a woman's board is admissible upon the question of damages. *Soderlund* v. *Helman*, 542.

In an action for the breach of a contract to purchase milk from the plaintiff for a year, where it appears that the action was brought within three and one half months after the contract was made, the measure of damages should include such profits as the plaintiff would have realized from the contract if it had been fully performed and which the defendant's breach of the contract prevented him from realizing. *Raymond* v. *Phipps*, 559.

Evidence which was held to be admissible to prove the amount of such profits. *Ibid.*

In Tort.

In an action of tort for personal injuries, the defendant should not be allowed to show in reduction of damages that the plaintiff received money under a policy of accident insurance by reason of his injuries, the transactions between an insurance company and the plaintiff having no bearing on the extent of his injuries nor upon the defendant's liability for them. *Gray* v. *Boston Elevated Railway*, 143.

In an action of tort for personal injuries sustained by a professor of economics and political science of a State university, it was held that the plaintiff, if he prevailed, was entitled to recover damages not only for the pain and suffering that he endured but also for the loss of time, of the valuable use of which he was deprived. *Ibid.*

And therefore in such a case the plaintiff properly may be allowed upon the question of damages to show the extent of his studies and his special equipment in his department of learning, and that five months before his injury he had entered into a profitable contract for the preparation of a series of articles on "Economics of Advertising" which he had planned to write during his summer vacation and that he was prevented by his injury from doing this. *Ibid.*

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In the same action the plaintiff sought to recover damages for his loss of valuable time as well as for his sufferings, and it was held to have been proper for the presiding judge to instruct the jury to the effect that in determining the amount of damages the jury might consider the amount of the plaintiff's "average earnings, his professional reputation and his special attainments in his profession." *Gray* v. *Boston Elevated Railway*, 143.

In an action of tort for personal injuries, it is proper for the presiding judge to instruct the jury upon the question of damages, that if "the plaintiff in an honest effort to lessen the injurious effects of the accident used due care in applying for treatment of the wound on his knee to a reputable physician, the defendant is responsible in damages for the injuries that resulted to the plaintiff from the defendant's negligence, even though such injuries were aggravated by an accidental or mistaken, but honest, treatment on the part of said physician." *Ibid.*

At the trial of an action for the conscious suffering and death of one alleged to have lost his life by reason of negligence of an employee of a street railway company, evidence is admissible, for the purpose of proving the state of mind of the injured person after the injury and, by inference, his mental suffering, which tends to show that he said, after the accident and before the bringing of the action, that his back was broken and he knew that he was not going to get better. *Buckley* v. *Boston Elevated Railway*, 50.

Where a married woman has recovered judgment against a railroad corporation in an action for personal injuries caused by a collision of trains, her husband, in a subsequent action against the railroad corporation for consequential damages caused to him by her injuries, can recover nothing for loss of consortium. *Whitcomb* v. *New York, New Haven, & Hartford Railroad*, 440.

In an action of tort for personal injuries, which is tried before a judge without a jury and in which the defendant's liability is admitted, where no ruling of law is asked for or made in regard to the amount of damages to be allowed for medical attendance, the amount of such damages is a matter of fact to be determined by the decision of the trial judge. In the present case it was said that, if the findings of the judge upon this matter were reviewable, this court saw no error in them. *Ibid.*

At the trial before a judge without a jury of an action of tort by a husband against a railroad corporation for consequential damages caused by personal injuries sustained by the plaintiff's wife in a collision of trains on the defendant's railroad, for which the plaintiff's wife in a previous action has recovered damages from the defendant, it was for the judge to say in the first place what injuries resulted from the accident and what, if any, diseases were set in motion by it as the direct and efficient cause, and then to say what medical and other attendance and treatment were reasonably necessary, and what was the fair value of the services and treatment so rendered. *Ibid.*

In an action of tort, by an attorney at law against the publisher of a newspaper, for an alleged libel in publishing an article purporting to give the names of six persons indicted by a grand jury and afterwards arrested for conspiracy to defraud persons unknown, falsely naming the plaintiff as one of the persons indicted and arrested and identifying him by description, the plaintiff, if he prevails, may recover damages, under appropriate allegations in his declaration, for mental suffering and distress, for illness suffered by him in

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consequence of the libel, for loss of reputation in his profession and for loss of business. *Sweet* v. *Post Publishing Co.* 450.

In Equity.

Damages in a suit in equity to restrain the defendant from selling goods in packages made in imitation of those of the plaintiff. *Forster Manuf. Co.* v. *Cutter-Tower Co.* 136.

What damages may be recovered in a suit in equity by an owner of property on a stream to enjoin pollution of the stream and for damages from past pollution. *Parker* v. *American Woolen Co.* 176.

Liquidated.

Where there is an express stipulation that a sum of money deposited to secure the performance of a contract in writing shall be forfeited, in case of a breach of the contract by the depositing party, as "fixed, liquidated and ascertained damages," the parties are to be taken at their word, unless it is apparent from the terms of the entire contract and an examination of the subject matter that the forfeiture is to be treated as a penalty. *Kaplan* v. *Gray*, 269.

In Recoupment.

In an action by a railroad corporation against the consignee of goods, who received them from the plaintiff under a bill of lading by which he agreed to pay the freight rates established under the interstate commerce act, to recover a balance of the freight charges, which had not been claimed at the time of the delivery of the goods by reason of an erroneous classification that was not discovered until several months later, it was held that the defendant could not be allowed to reduce the damages by showing in recoupment the effect of the payment of and the receipt given for the wrong rate. *New York, New Haven, & Hartford Railroad* v. *York & Whitney Co.* 36.

Reduction or Mitigation of Damages.

In an action of tort for personal injuries, the defendant should not be allowed to show in reduction of damages that the plaintiff received money under a policy of accident insurance by reason of his injuries, the transactions between an insurance company and the plaintiff having no bearing on the extent of his injuries nor upon the defendant's liability for them. *Gray* v. *Boston Elevated Railway*, 143.

In an action for the alleged conversion of a ring wrongfully pawned to the defendant by a conditional purchaser to whom the plaintiff had delivered it, where it appears that the plaintiff demanded the ring from the defendant who refused to give it up, such demand and refusal are proof of a conversion upon which the plaintiff's right to damages became complete, and, if at the trial the defendant offers the ring to the plaintiff in reduction of damages, the plaintiff has the right to refuse to receive it and to insist on full payment in cash. *Sallinger* v. *Collateral Loan Co.* 266.

DEATH.

Actions for death caused by negligence, see NEGLIGENCE, *Causing Death.*

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DEED.

Proof, by use of an ancient plan, of the location of a boundary described in a deed. *Brown* v. *Metcalf*, 289.

Where a deed to a railroad corporation of a part of a farm contains a stipulation for a "passway" for the benefit of the grantor "over" the railroad "for farming purposes," a successor in title to the grantor has no right of way over the land so conveyed for any other than farm purposes. *Cornell-Andrews Smelting Co.* v. *Boston & Providence Railroad*, 381.

Where the owner of land used exclusively for agricultural purposes conveys a part of it by a deed containing a provision reserving "a right of open way" from the remainder of the land through the portion conveyed to a street, a subsequent grantee of the remainder of the land may use such way not only for agricultural purposes but also for any changed use to which it reasonably may be put in connection with the use of his land. *Ibid.*

Upon the question, whether a right of way defined in a deed by ambiguous words was over a proposed private street only so far as such street should adjoin the land conveyed or whether the easement extended over a prolongation of the proposed street upon other land of the grantor, the acts of a subsequent owner of such other land more than eight years after the making of the deed to be interpreted have no bearing on the meaning of the doubtful language of that deed. *Hurd* v. *General Electric Co.* 358.

Where the owner of a tract of land conveyed a parcel of it bounded "on a proposed street to be laid out fifty feet wide one hundred and eighty feet . . . with a right of way over said proposed street," it was held that on all the evidence it was to be inferred that at the date of the deed there did not exist in the contemplation of the grantor or the grantee any other or longer proposed street than such as would adjoin the granted premises. *Ibid.*

In a suit in equity to establish a certain private way as designated upon a certain plan recorded in the registry of deeds, it appeared that the previous owner of the land of both the plaintiff and the defendant in his will devising to the defendant a lot of land and the executor of the will in a deed conveying another lot to the plaintiff under a license from the Probate Court, both had bounded the lots on the private way as shown on a recorded plan referred to by the registry volume and page, and it was held that the plan referred to in the devise to the defendant and in the deed to the plaintiff was incorporated in each as a part of the devise and conveyance so far as applicable thereto, and that the defendant as against the plaintiff was bound by the location of the way thus defined. *Kaatz* v. *Curtis*, 311.

DEVISE AND LEGACY.

Rule against Perpetuities.

A gift by will of real estate and personal property to a church, after successive life estates to the testator's widow and an adopted daughter and the children of the adopted daughter, was held not to be void as in violation of the rule against perpetuities although the estate of the children of the adopted daughter might postpone beyond a period twenty-one years after a life or lives in being the vesting of the estate in possession in the church. *Dodge* v. *Bennett*, 545.

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Incorporation of Plan by Reference.

In a suit in equity to establish a certain private way as designated upon a certain plan recorded in the registry of deeds, it appeared that the previous owner of the land of both the plaintiff and the defendant in his will devising to the defendant a lot of land and the executor of the will in a deed conveying another lot to the plaintiff under a license from the Probate Court, both had bounded the lots on the private way as shown on a recorded plan, referred to by the registry volume and page, and it was held that the plan referred to in the testator's devise to the defendant and in the executor's deed to the plaintiff was incorporated in each as a part of the devise and conveyance so far as applicable thereto, and that the defendant as against the plaintiff was bound by the location of the way thus defined. *Kaatz* v. *Curtis*, 311.

Residuary Clause.

The last clause of the will of a widow without children read as follows: "I bequeath and devise my Silver, and Jewelry as follows; To . . . [four women by name] . . . .) They to divide it up between Themselves) And also the remainder if any" and it was held that by the words "And also the remainder if any," the testatrix disposed of the residue of her property, including the real estate. *Bates* v. *Kingsley*, 62.

Vested Remainder.

A gift by will of real estate and personal property to a church, after successive life estates to the testator's widow and an adopted daughter and the children of the adopted daughter, was held not to be void as in violation of the rule against perpetuities although the estate of children of the adopted daughter might postpone beyond a period twenty-one years after a life or lives in being the vesting of the estate in possession in the church. *Dodge* v. *Bennett*, 545.

Provision for Support.

Construction of provisions of a will in which the testator left the residue of his estate to trustees for the support and maintenance of the testator's wife "and the care, maintenance, and education of our children, during her life, or until she shall marry again," from which it was held that the income was received by the testator's wife subject to a trust for the reasonable support of herself and her children until her death or marriage, and that so much of the income received by the widow as was not needed for the reasonable support of herself and her children was held by her as her own property free from trust. *Johnson* v. *Johnson*, 276.

Charity.

Where by a provision in a will a legacy of $5,000 is given to a certain private charitable corporation, which, although in existence at the time of the testator's death, refuses the gift and waives its claim thereto, the legacy does not vest in such corporation, nor does it lapse; but it is a valid charitable gift, and, if there is another private charitable corporation which is es-

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tablished and carried on for substantially the same purpose and which apparently is the only such private institution in existence in the Commonwealth, a decree may be made, in a bill in equity by the executor for instructions, directing that the legacy be paid to the second corporation to be held by it in trust for the same purpose for which it would have been used if the first corporation had accepted it. *Read* v. *Willard Hospital*, 132.

Cy Pres.

Application of the doctrine of *cy pres* to a devise by a widow of her former residence "for an Old Folks Home, both male and female, of Evangelical Creed," where it appeared that the house given was not suitable for an old folks' home and certain property devoted to the home by the will was insufficient for the purpose. *Norris* v. *Loomis*, 344.

Application of the doctrine of *cy pres*, *Norris* v. *Loomis*, 344.

Trust.

As to trusts created by wills, see TRUST.

"Heirs at Law."

Construction of a provision of a will that, upon the death of an unmarried daughter of the testator, a trust should be terminated and the property be distributed "among my heirs at law, according to the statutes which shall then be in force in said Commonwealth regulating the distribution of intestate estates," from which it was held that by the words "heirs at law" the testator designated those persons, not expressly excluded, who would have been his heirs at law if he had died at the time of the death of his unmarried daughter. *White* v. *Underwood*, 299.

"Wife."

Construction of the language of a codicil, excluding from the benefits of the will the wife and issue of a certain son of the testator, where it appeared that, at the time of the making of the codicil the designated son had been divorced from a wife by whom he had children, and after the death of the testator this son married a second wife by whom he had children, from which it was held that the later wife and children of the designated son as well as the children of his first wife were excluded from the distribution. *White* v. *Underwood*, 299.

DIVORCE.

See MARRIAGE AND DIVORCE.

ELEVATED RAILWAY.

Actions against elevated railway corporations for personal injuries, see NEGLIGENCE, *Elevated Railway*.

Definition of the phrase, "highest degree of care," see *Buckley* v. *Boston Elevated Railway*, 50.

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EMINENT DOMAIN.

The interest of the public that the people should be well housed, although proper to be considered in the exercise of the police power, is not a proper subject for the exercise of the right of eminent domain. By RUGG, C. J. *Salisbury Land & Improvement Co.* v. *Commonwealth*, 371.

St. 1912, c. 715, purporting by § 4 to authorize the Salisbury Beach Reservation Commission to take certain land by right of eminent domain as a public reservation and providing in § 10 that "Said commission may sell or lease any lands or rights in land taken or acquired by it, which are not needed as a public reservation," was held to be unconstitutional as an attempt to authorize the exercise of the right of eminent domain in part for a private purpose, and because it was impossible to separate the valid from the invalid portions of the statute. *Ibid.*

Petitions for damages for land taken or injured under statutory authority, see appropriate subtitle under DAMAGES.

EMPLOYER'S LIABILITY.

See that subtitle under NEGLIGENCE.

For compensation of workmen for injuries received during employment, see WORKMEN'S COMPENSATION ACT.

EQUITABLE RESTRICTION.

Where the owner of a tract of land facing on a street in a city divided it into six lots, conveyed three of them with a certain restriction in each deed, two others with a similar restriction, and the sixth lot subject to no restriction, and none of the deeds referred to any plan or expressed any intent to benefit the other lots by the restriction, it was held that no general scheme was established by the common grantor, on which to found a right in the owner of one of the lots to enforce in equity the restriction imposed on the holder of another of the lots by his deed or the deed of a predecessor in title. *Webber* v. *Landrigan*, 221.

EQUITY JURISDICTION.

Acquired for one Purpose, retained for all.

The well established principle here was applied, that where a court of equity has jurisdiction of a suit for one purpose it will, if justice so requires, exercise it for any purpose within the scope of the bill. *Perry* v. *Pye*, 403.

Laches.

There was held to be no laches on the part of the plaintiff in a suit in equity to enforce a trust as to repayment of an investment, where the defendants were successors of trustees of a real estate trust who had received certain land from one who held it subject to the trust in favor of the plaintiff, of which they were given no notice. *Bisbee* v. *Mackay*, 21.

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On certain facts as to the presentation of a motion to amend a bill in equity, about ten years after the suit was brought and over a year after a rescript had issued from this court directing that the bill be dismissed because it did not appear that it was brought in a proper representative capacity, by the alleging of new facts and the substituting of a new party plaintiff, it was held that it could not be said that such laches, either of the original plaintiffs or of the substituted plaintiff, appeared upon the record as to make the allowance of the amendments improper as a matter of law. *Strout* v. *United Shoe Machinery Co.* 116.

In a suit in equity by an automobile dealer against a manufacturer to enforce a contract whereby the plaintiff was appointed the defendant's exclusive agent in a certain territory, findings of the trial judge that the plaintiff had not been guilty of laches were held not to have been clearly wrong. *Wier* v. *American Locomotive Co.* 303.

"Clean Hands."

In a suit in equity between partners for an accounting as to an option, alleged to have been taken by the defendant in his own name, for an extension of a lease held by the partnership, which option the defendant sold for his own benefit, it was held to be no defense to the plaintiff's right to an accounting, that before the defendant purchased the option for the renewal of the lease, the plaintiff attempted without success to get a lease of the premises for himself without the knowledge of his copartners, because the plaintiff's attempt to circumvent his copartners was not a part of the transaction for which the defendant was called to account and does not prevent the plaintiff, as to that transaction, from coming into court with clean hands. *Lurie* v. *Pinanski*, 229.

It was held, in a suit in equity against several defendants to be relieved from the results of fraud perpetrated by the defendants in conspiracy, the plaintiff being the pledgor of securities, and the defendants pledgees and second pledgees, that the fact that the plaintiff created a fictitious market for the securities did not constitute such a wrongful inducement of the wrongful acts complained of that the court would refuse to entertain the suit. *Warfield* v. *Adams*, 506.

Waiver.

In a suit in equity by an automobile dealer against a manufacturer to enforce a contract whereby the plaintiff was appointed the defendant's exclusive agent in a certain territory, findings of the trial judge that the plaintiff had not waived the provisions of the contract were held not to have been clearly wrong. *Wier* v. *American Locomotive Co.* 303.

Plaintiff must do Equity.

It was held, in a suit in equity against several defendants to be relieved from the results of fraud perpetrated by the defendants in conspiracy, the plaintiff being the pledgor of securities and the defendants pledgees and second pledgees, that the doctrine that he who seeks equity must do equity did not prevent the plaintiff from maintaining his bill although he had created a fictitious market for the securities. *Warfield* v. *Adams*, 506.

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Res judicata.

In a suit in equity the confirmation of a master's report by a final decree makes all findings of fact contained in that report conclusive between the parties to the suit, and these matters are none the less *res judicata* if such final decree was entered by the consent of the parties. *C. A. Briggs Co.* v. *National Wafer Co.* 100.

A judgment for the plaintiff in an action of summary process for possession of certain land, entered after a full trial of the question, whether the plaintiff and his predecessors in title had notice of a lease of the premises for more than seven years, given by a former owner to the defendant before the plaintiff's predecessor received title, but not recorded, was held to be *res judicata* barring the maintenance of a suit in equity to establish and protect the lessee's right to possession, begun before the action of summary process was begun and continued under an amended bill after the judgment in that action. *Edwards* v. *Columbia Amusement Co.* 125.

Under a lease of a chattel for a stipulated rent of a certain sum of money a month payable in advance, the lessor can bring an action for each unpaid monthly instalment of rent as it falls due, and if, after he has brought an action for the rent due up to the date of the writ and before such action has come to trial, he brings a suit of equitable replevin in which he claims rent that fell due after the previous action was brought and obtains a decree ordering the defendant to deliver the chattel to him and to pay him the rent claimed in that suit, the decree is no bar to the first action brought for the rent previously due. *Electrelle Co.* v. *Maguire,* 550.

To enforce Agreement of Compromise as to a Will.

Although, apart from the provisions of R. L. c. 148, §§ 14–18, this court has jurisdiction in equity to enforce a compromise agreement in regard to property acquired under a will between parties who are *sui juris* and where no contingent interests are affected, this jurisdiction does not extend to the enforcement of an alleged compromise agreement affecting future contingent interests. *Parker* v. *New England Trust Co.* 226.

It seems, that a bill in equity cannot be maintained to compel one who is named as executor and trustee in an alleged will, the proof of which is pending in the Probate Court, to administer the property of the estate of the alleged testator in accordance with an agreement of compromise, because unless the will is allowed there can be no compromise concerning it. *Ibid.*

For an Accounting.

In a suit in equity to restrain unfair competition in the use of a trade name to which the plaintiff is alleged to have established an exclusive right, if the plaintiff seeks an accounting for profits derived from the unlawful use of the trade name, but otherwise demands no damages, and if the plaintiff shows that the defendant received substantial sums of money from sales of goods wrongfully bearing the plaintiff's label or an imitation of it, but it appears that the defendant's general expenses were incurred at least proportionally for such unlawful dealings and that after deducting the proportionate share of such expenses the unlawful dealings showed no

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profit, the plaintiff is entitled to nothing by way of profits. *C. A. Briggs Co.* v. *National Wafer Co.* 100.

Bill in equity by a holder of bonds of a mining corporation, against the directors of the corporation, the corporation and trustees holding the corporation property in mortgage to secure the bondholders' rights, for an accounting as to funds which the plaintiff alleges should be paid to the trustees because of waste and strip committed by persons to whom the corporation had let its property. *Young* v. *Haviland*, 120.

In a suit in equity to restrain the defendant from selling certain goods in packages made in imitation of those of the plaintiff, where the plaintiff seeks damages as well as an accounting for profits unlawfully obtained by the defendant, the plaintiff, if he prevails, although he may recover both damages and profits so far as this may be necessary for his full compensation, cannot recover as damages the profits which he would have realized if he had made the sales that were made wrongfully by the defendant and also recover the profits that the defendant made on the same sales. *Forster Manuf. Co.* v. *Cutter-Tower Co.* 136.

Suit in equity between partners for an accounting as to an option, alleged to have been taken by the defendant in his own name, for an extension of a lease held by the partnership, which option the defendant sold for his own benefit. *Lurie* v. *Pinanski*, 229.

To relieve from Results of Fraud.

In a suit in equity for a rescission of an exchange of property between the plaintiff and two of the defendants, on the ground that it was procured by the false and fraudulent representations of those two defendants and also of a third defendant, who acted as their broker in the transaction, it appeared that one of the two defendants who received the plaintiff's property had sold a part of the property thus received by him for $8,000 before the fraud was discovered and the return of the property was demanded, and it was held that the defendant who received and sold this part of the plaintiff's property was liable to the plaintiff for its proceeds. *Cook* v. *Scheffreen*, 444.

It also was held that the defendant who acted as broker in the transaction, although he took part in the fraudulent representations and could have been held liable for the loss caused by the fraud, did not receive any part of the plaintiff's property of which a reconveyance was sought and was not liable for the $8,000 received by another defendant for a part of this property. *Ibid.*

In a suit in equity against a number of defendants, where the bill alleges a conspiracy to defraud the plaintiff to which all of the defendants were parties, if the conspiracy alleged is proved to have existed among some of the defendants but not all of them, those against whom the conspiracy is proved may be held liable. *Warfield* v. *Adams*, 506.

In the same suit it was held, that the facts, that the plaintiff by causing apparent sales to be made had created a fictitious market value for certain securities which he pledged to a defendant pledgee, and the greater part of which that defendant pledged to the other defendants, did not constitute such an unlawful inducement of the wrongful acts complained of that the court would refuse to entertain the plaintiff's suit; nor did those facts

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prevent the plaintiff from maintaining his bill on the doctrine that he who seeks equity must do equity. *Warfield* v. *Adams*, 506.

To restrain Unfair Competition.

A merely descriptive epithet, which is incapable of becoming a valid trademark, by long and exclusive use in trade may become so associated with a particular class of goods or with the specific product of a particular manufacturer, that the attaching of the epithet to a similar product by a competing manufacturer or seller under certain circumstances may be restrained in equity as unfair competition. *C. A. Briggs Co.* v. *National Wafer Co.* 100.

If such manufacturer has created for the name within a certain territory a secondary meaning which entitles him to protection against unfair competition in its use, he is not entitled to restrain the use of such trade name outside the territory within which he has established the meaning on which his rights depend. *Ibid.*

On an accounting for profits in a certain suit to restrain such unfair competition, it was held that the defendant's unlawful dealings showed no profits. *Ibid.*

In a suit in equity to restrain the defendant from selling certain goods in packages made in imitation of those of the plaintiff, where the plaintiff seeks damages as well as an accounting for profits unlawfully obtained by the defendant, the plaintiff, if he prevails, although he may recover both damages and profits so far as this may be necessary for his full compensation, cannot recover as damages the profits which he would have realized if he had made the sales that were made wrongfully by the defendant and also recover the profits that the defendant made on the same sales. *Forster Manuf. Co.* v. *Cutter-Tower Co.* 136.

If the plaintiff in such suit suffered loss or damage from the defendant's acts for which the receipt of the defendant's profits will not compensate him, he is entitled to recover this additional amount as damages, but he cannot be allowed to recover twice for the same loss. *Ibid.*

To relieve from Results of Mistake.

In a suit in equity by a member of a partnership, which had been composed of three persons, against the widow of one of the three partners, personally and as the executrix of his will under which she was the sole legatee and devisee, alleging that upon an accounting, by reason of a mutual mistake of fact made by all the parties through their common agent, the defendant received much more than her share of the partnership assets, and seeking to recover such excess from her personally, R. L. c. 141, § 9, limiting actions against an executor or administrator, is no defense. *Bowker* v. *Torrey*, 547.

Upon the question, whether such a suit can be maintained without joining the third member of the partnership either as a plaintiff or a defendant, no opinion was expressed. *Ibid.*

Rescission by Reason of Fraud.

In a suit in equity for a rescission of an exchange of property between the plaintiff and two of the defendants, on the ground that it was procured

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by the false and fraudulent representations of those two defendants and also of a third defendant, who acted as their broker in the transaction, it appeared that one of the two defendants who received the plaintiff's property had sold a part of the property thus received by him for $8,000 before the fraud was discovered and the return of the property was demanded, and it was held that the defendant who received and sold this part of the plaintiff's property was liable to the plaintiff for its proceeds. *Cook* v. *Scheffreen*, 444.

It also was held that the defendant who acted as broker in the transaction, although he took part in the fraudulent representations and could have been held liable for the loss caused by the fraud, did not receive any part of the plaintiff's property of which a reconveyance was sought and was not liable for the $8,000 received by another defendant for a part of this property. *Ibid.*

Subrogation.

Application of the equitable doctrines as to subrogation and the avoiding of circuity of actions, in the determining of the amount for which execution should issue in an action against the surety upon a probate bond of one of two trustees. *Harmon* v. *Weston*, 242.

Enforcement and Control of Trusts.

In a suit in equity by an investor against the successors of trustees to whom a single trustee had conveyed without consideration certain land which he held subject to a trust providing for repayment to the plaintiff of his investment, the trust was enforced although the defendants' predecessors in office had had no notice of it. *Bisbee* v. *Mackay*, 21.

In a suit in equity by a fraternal beneficiary corporation against the executrix of the will of a former treasurer of a subordinate lodge to impress a fund in a bank account in such former treasurer's own name, in which also were mingled moneys received by him from various other sources, with a trust in the plaintiff's favor and to compel its transfer, it was held that a mistake of the former treasurer in overdrawing the account at the bank did not act, under the circumstances, as a dissipation of the fund, and that a decree for the plaintiff was justified. *Portuguese Fraternity* v. *Liberty Trust Co.* 27.

Where a trust is created by an interlocutory decree made by the Superior Court in a suit in equity and under the general equity jurisdiction of the court a trustee is appointed with duties analogous to those of a receiver, such trustee is not required to give a bond to the judge of probate under R. L. c. 150, § 1, and his accounts as trustee can be settled in the original suit. *Rice* v. *Merrill*, 419.

In a suit in equity by an aged widow, seeking to set aside a deed of property made by her to the defendant conditioned upon her comfortable support by the defendant during her lifetime, an interlocutory decree may be made ordering the defendant to convey to a certain person as trustee all the property conveyed to him by the plaintiff, to be held by such trustee for the benefit of the plaintiff upon trusts stated in the decree, and, upon the plaintiff's death, to apply any balance of the trust fund in his hands as therein directed in satisfaction of any just debts or expenses incurred under the

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trust, and to pay the balance then remaining to the plaintiff's executor or administrator. *Rice* v. *Merrill*, 419.

Where the defendant has made a deed to the trustee in accordance with the terms of such a decree, which is accepted by the plaintiff, who enjoys the benefit of the trust until her death more than two years later, the executor of the plaintiff's will, if the circumstances under which the interlocutory decree was made do not appear, cannot be heard to assert that the decree or the trust created by it was invalid. *Ibid.*

In such a case the duties of the trustee appointed by the interlocutory decree do not terminate upon the death of the original plaintiff in the suit, and it is his duty, before paying over the balance of the fund to the executor of the will of the deceased plaintiff, to pay the expenses incurred under the trust, comprising all disbursements and obligations for the comfortable support and maintenance of the deceased plaintiff, for his own charges and compensation, and for proper services rendered to him by counsel, including necessary services rendered in litigation incidental to the settlement of his accounts. *Ibid.*

Partnership Matters.

Suit in equity between partners for an accounting as to an option, alleged to have been taken by the defendant in his own name, for an extension of a lease held by the partnership, which option the defendant sold for his own benefit. *Lurie* v. *Pinanski*, 229.

Suit by Bondholder of Corporation for Preservation of Security.

A bill in equity by a holder of bonds of a mining corporation against the directors of the corporation, the corporation and two trustees to whom the corporation has conveyed its property to secure the payment of bonds issued by it cannot be maintained for an accounting as to funds which the plaintiff alleges should be paid to the trustees because of waste and strip committed by persons to whom the corporation had leased its property, unless the plaintiff proves that a demand was made upon the trustees to act and that they refused or neglected to do so, or unless facts appear which make it plain that such a demand would have been useless. *Young* v. *Haviland*, 120.

Facts which, it was held, were not sufficient to show that it would have been useless to have demanded of the trustees that they take the action which the plaintiff contended they should have taken. *Ibid.*

Facts upon which it was held in the same suit that the directors were not liable. *Ibid.*

Receiver.

A suit in equity by the surety on a probate bond, given by a trustee who was entitled to share as beneficiary in the income of the trust fund and who misappropriated a part of such trust fund, for the appointment of a receiver to hold the interest of such defaulting trustee, to which the plaintiff claimed to be subrogated, with directions to account to the plaintiff for the income during the lifetime of such defaulting trustee and on his death to pay to the plaintiff any part of the principal of the trust fund to which such defaulting trustee might be entitled, it was held, could not be maintained, where such defaulting trustee's interest in the principal of the trust

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fund was only a contingent power of testamentary appointment. *Harmon* v. *Weston*, 242.

To reach and apply Equitable Assets.

A suit in equity under R. L. c. 159, § 3, cl. 7, to reach and apply equitable assets to the payment of a debt alleged to be due to the plaintiff, which has not been reduced to a judgment, combines in substance a proceeding at law to establish the debt with a separate proceeding in equity for the collection of the debt when established, and upon the issue of the existence of the debt either party has a constitutional right to a trial by jury. *Stockbridge* v. *Mixer*, 415.

Time when a claim of such a jury trial should be filed is governed by Equity Rule 36, and, where a replication is filed, is within ten days of such filing. *Ibid.*

Neither creditors nor assignees of a spendthrift, it was held, had any right to reach the income of a trust created for the benefit of the spendthrift which provided that the income should be paid to him during his lifetime, but without power of alienation and not subject to interference or control by creditors, where it appeared that the trust was created upon the withdrawal by the spendthrift of his opposition to the allowance of a certain will, which opposition had not been made in good faith and was merely an attempt to extort a settlement for his benefit. *Hale* v. *Bowler*, 354.

To enforce Liens under R. L. c. 6, § 77.

Certain claims for which, it was held, no liens attached against funds retained by the Commonwealth under a contract for the construction of a State highway. *Thomas* v. *Commonwealth*, 369.

Equitable Replevin.

Under a lease of a chattel for a stipulated rent of a certain sum of money a month payable in advance, the lessor can bring an action for each unpaid monthly instalment of rent as it falls due, and if, after he has brought an action for the rent due up to the date of the writ and before such action has come to trial, he brings a suit of equitable replevin in which he claims rent that fell due after the previous action was brought and obtains a decree ordering the defendant to deliver the chattel to him and to pay him the rent claimed in that suit, the decree is no bar to the first action brought for the rent previously due. *Electrelle Co.* v. *Maguire*, 550.

To enforce Equitable Restrictions.

Suit in equity to enforce an alleged equitable restriction, which, it was held, could not be maintained because there was not shown any general scheme of the common grantor of the plaintiff and the defendant that there should be restrictions enforceable for the common benefit of the owners of six lots formerly owned by such grantor. *Webber* v. *Landrigan*, 221.

To enforce Riparian Rights.

In a suit in equity by an owner of land bordering on a stream against an upper riparian owner to enjoin the defendant from polluting the stream and for

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damages, after, on an appeal by the defendant from an interlocutory decree confirming a master's report and enjoining the defendant as prayed for, this court has ordered a decree for the plaintiff and has given him leave to move for a recommittal of the case to the master for an assessment of damages, and the case has been so recommitted, the only questions open upon such recommittal are questions relating to damages, and the defendant should not be permitted to introduce evidence to show that other persons besides himself caused the pollution complained of. *Parker* v. *American Woolen Co.* 176.

Damages which may be recovered by the plaintiff in such a suit. *Ibid.*

To enjoin Interference with Possession of Land.

A judgment for the plaintiff in an action of summary process for possession of certain land, entered after a full trial of the question, whether the plaintiff and his predecessors in title had notice of a lease of the premises for more than seven years, given by a former owner to the defendant before the plaintiff's predecessor received title, but not recorded, was held to be *res judicata* barring the maintenance of a suit in equity to establish and protect the lessee's right to possession, begun before the action of summary process was begun and continued under an amended bill after the judgment in that action. *Edwards* v. *Columbia Amusement Co.* 125.

It also was held that the bill in equity as amended was not an "action . . . brought . . . to recover the lands or tenements in question," to which by R. L. c. 181, § 9, the judgment in the action of summary process would not be a bar, because the plaintiff did not seek therein to settle the title to the land, but only the right to present possession. *Ibid.*

Effect of Injunction.

An injunction, issued on an information filed by the Attorney General under R. L. c. 119, § 19, against a foreign fraternal beneficiary corporation, enjoining it "from prosecuting any business of such corporation within this Commonwealth," excuses the corporation from levying an assessment to procure funds with which to pay a death benefit due by reason of the death of a member after the injunction had issued, although after such death the injunction was modified to permit the corporation to defend actions brought against it and "to pay such claims as are now pending against it." *Moshenz* v. *Independent Order Ahawas Israel*, 185.

To avoid Circuity of Action.

Application of the equitable doctrines as to subrogation and the avoiding of circuity of actions, in the determining of the amount for which execution should issue in an action against the surety upon a probate bond of one of two trustees. *Harmon* v. *Weston*, 242.

Set-off.

The doctrine of set-off, applied by statute to actions at law, had its origin in courts of equity, where the power to compel a set-off of cross demands or of

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judgments has been exercised whenever necessary for the proper administration of justice. *Perry* v. *Pye*, 403.

In a suit in equity by the holder of a promissory note made by the defendant, who was not an inhabitant of this Commonwealth, seeking to have the amount due on the note set off against any judgment that the defendant might recover against the plaintiff in a pending action at law, it was held that under the circumstances the plaintiff was entitled to have a decree in set-off against any judgment that might be obtained against him in the action at law. *Ibid.*

Trial by Jury.

Constitutional right to a trial by jury in a suit to reach and apply equitable assets in satisfaction of a debt. *Stockbridge* v. *Mixer*, 415.

Time when a claim of such a jury trial should be filed is governed by Equity Rule 36, and, where a replication is filed, is within ten days of such filing. *Ibid.*

Bill of Interpleader.

In a bill in equity to have two defendants ordered to interplead so that their respective rights to a fund in the hands of the plaintiff may be determined, if the specific allegations of the bill disclose a ground on which the plaintiff may be held liable to one of the defendants, which cannot be passed upon in a suit of interpleader, the bill cannot be maintained, although it contains a general allegation that the plaintiff holds the fund for the true owner and has incurred no independent liability to either of the defendants. *National Security Bank* v. *Batt*, 489.

Bill of interpleader, a demurrer to which was sustained for the foregoing reason. *Ibid.*

Damages.

Damages in a suit to restrain the defendant from selling goods in packages made in imitation of those of the plaintiff. *Forster Manuf. Co.* v. *Cutter-Tower Co.* 136.

What damages may be recovered in a suit in equity by an owner of property on a stream to enjoin pollution of the stream and for damages from past pollutions. *Parker* v. *American Woolen Co.* 176.

Damages assessed in a suit for breach by a manufacturer of a contract appointing the plaintiff his exclusive agent. *Wier* v. *American Locomotive Co.* 303.

EQUITY PLEADING AND PRACTICE.

Parties.

Whether a suit in equity by a member of a partnership, which had been composed of three persons, against the widow of one of the three partners, personally and as the executrix of his will under which she was the sole legatee and devisee, to set aside an accounting because of an alleged mutual mistake and to remedy the mistake, can be maintained without joining the third member of the partnership either as a plaintiff or a defendant, was not decided. *Bowker* v. *Torrey*, 547.

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Bill.

The objection that a bill in equity is multifarious can be raised only by assigning this cause of demurrer, and is waived by a demurrer which does not contain such an assignment. *Perry* v. *Pye*, 403.

Cross Bill.

Reversal, on an appeal by the plaintiff in a suit in equity to enjoin the defendant from cutting wood on fourteen acres of land alleged to belong to the plaintiff, of a decree giving the defendant affirmative relief, because such appeal only could be granted upon a cross bill. *Matthews* v. *Colburn*, 571.

Demurrer.

The objection that a bill in equity is multifarious can be raised only by assigning this cause of demurrer, and is waived by a demurrer which does not contain such assignment. *Perry* v. *Pye*, 403.

Amendment.

The statutory provisions authorizing amendments by a change of parties and otherwise, now included in R. L. c. 173, § 48, although not made applicable to suits in equity by their express terms, have been treated as applying to such suits or adopted in equity practice by analogy. *Strout* v. *United Shoe Machinery Co.* 116.

An amendment in a suit in equity, changing the plaintiff and substituting a new form of the bill, properly may be allowed, if the original plaintiff consents, even after a rescript has been issued by this court ordering that the bill be dismissed. *Ibid.*

It was held that this court could not review the action of a judge of the Superior Court allowing, upon arguments and statements by counsel for the respective parties, an amendment changing the plaintiff and stating the ground of a certain suit in a new form. *Ibid.*

It is not a conclusive objection to the allowance of a motion to amend a bill in equity that by reason of the allowance complicated issues may have to be heard involving a consideration of the laws of a foreign State and the powers of officers appointed by its courts. *Ibid.*

On certain facts as to the presentation of a motion to amend a bill in equity, about ten years after the suit was brought and over a year after a rescript had issued from this court directing that the bill be dismissed because it did not appear that it was brought in a proper representative capacity, by the alleging of new facts and the substituting of a new party plaintiff, it was held that it could not be said that such laches, either of the original plaintiffs or of the substituted plaintiff, appeared upon the record as to make the allowance of the amendments improper as a matter of law. *Ibid.*

Rules of Court.

Equity Rule 36. *Stockbridge* v. *Mixer*, 415.

Claim of Jury Trial.

In a suit in equity under R. L. c. 159, § 3, cl. 7, to reach and apply equitable assets to the payment of a debt alleged to be due to the plaintiff, which has

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not been reduced to a judgment, the time for claiming a trial by jury upon the issue of the existence of the debt was held to be governed by Superior Court Equity Rule 36. *Stockbridge* v. *Mixer*, 415.

Where the plaintiff files a replication, the parties were held not to be at issue within the meaning of the rule until such replication is filed. *Ibid.*

Issues for Jury.

In a suit in equity, where a defendant, who was made a party after the presentation by a master of the draft of his report, after the filing of the master's report makes a motion for the framing of issues for a jury, if it appears that this defendant before he became a party had appeared before the master, both as counsel and as an important witness in support of his alleged rights, and that the case was tried fully on its merits before the master, the denial by the trial justice of such defendant's motion to have issues framed for a jury is a proper exercise of judicial discretion. *Perry* v. *Pye*, 403.

Hearing by Master.

Where a suit in equity is referred to a master to hear and determine the merits of all the issues raised by the pleadings and to report to the court his findings of fact, his rulings of law and so much of the testimony as in his opinion may be necessary to a proper understanding of his rulings of law, a party has no right, by requesting certain findings of fact, to compel the master to adopt such findings or to give a reason for not adopting them. *Warfield* v. *Adams*, 506.

Where a suit in equity is referred to a master "to hear the parties and their evidence forthwith and report his findings to the court together with such facts and questions of law as either party may request," a party has a right to ask the master to report his rulings as to the admission of evidence, and a refusal of the master to report such rulings is a proper ground for recommitting his report. *Cook* v. *Scheffreen*, 444.

Where a suit in equity is referred to a master to "report his findings to the court together with such facts and questions of law as either party may request," it is no part of the master's duty to pass upon the question of law whether on the facts found by him the defendant or defendants are liable. *Ibid.*

In the above case such a ruling of a master as to the liability of one of the defendants, which had been confirmed by an order of the trial judge, was taken to have been adopted as a ruling of the judge, and was passed upon by this court for that reason. *Ibid.*

Where a party to a suit in equity goes to trial before a master under an order of reference which does not direct the master to report the evidence in whole or in part, this is an acquiescence in leaving the final determination of the facts to the master, and, at least after the findings of the master have come to the knowledge of the parties through this draft report, it is too late to ask as a matter of right that the master be ordered to report the evidence or some part of it. *Ibid.*

Master's Report.

In a suit in equity the confirmation of a master's report by a final decree makes all findings of fact contained in that report conclusive between the parties to the suit, and these matters are none the less *res judicata* if such final decree

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was entered by the consent of the parties. *C. A. Briggs Co.* v. *National Wafer Co.* 100.

Although a master's report in a suit in equity may be modified or reversed or recommitted to the master if any error appears to have been made or if any good reason for such action is shown, yet, unless one of these things is done by the trial judge, the report has the effect that a verdict or the special findings of a jury have in an action at law, and it will be presumed, where the contrary does not appear by the record, that the facts have been found correctly, that proper principles of law have been followed and that all matters have been dealt with rightly. *Ibid.*

A motion to set aside a master's report in a suit in equity for alleged errors of law and of fact is not a proper procedure. If errors of law appear in the report the remedy is by a motion to enter a decree on the report. If there are errors in conclusions of fact, and the evidence is not reported, it is too late to object to these errors after the master's report is before the court. *Cook* v. *Scheffreen*, 444.

Exceptions to Master's Report.

In a suit in equity exceptions to a master's report cannot be taken merely by filing with the master objections to his report entitled "Objections and exceptions." *Conseil Rochambeau, No. 128* v. *Lafleur*, 347.

Exceptions to a master's report founded on the alleged wrongful admission or exclusion of evidence must be overruled where it does not appear from the master's report that the master admitted or excluded the evidence as alleged. *Cook* v. *Scheffreen*, 444.

Exceptions to a master's report on the ground that certain findings are not supported by or are contrary to the evidence must be overruled where the evidence on which the findings were made is not reported. *Cook* v. *Scheffreen*, 444; *Matthews* v. *Colburn*, 571.

If a master in a suit in equity makes a ruling of law upon a question which he properly might have declined to pass upon and have left for the trial justice, yet, if his ruling is right, an exception to it will not be sustained. *Perry* v. *Pye*, 403.

In a certain suit in equity, exceptions to a master's report, relating to questions of fact on which the evidence, amply reported, was conflicting and irreconcilable, were overruled, because the master's findings to which the exceptions related were not shown plainly to have been erroneous. *Ibid.*

In a suit in equity against a number of defendants to relieve from fraud perpetrated by the defendants in conspiracy, exceptions by the plaintiff to erroneous rulings by a master, to the effect that the bill could not be maintained against one of the defendants unless all of the defendants joined in the conspiracy, must be overruled if it also appears by the report that on the facts found, wholly apart from these rulings, the bill cannot be maintained against any of the defendants. *Warfield* v. *Adams*, 506.

Recommittal of Master's Report.

Application of the ordinary rule that the denial in a suit in equity of a motion to recommit a master's report is within the discretionary power of the trial judge. *Warfield* v. *Adams*, 506.

In a suit in equity by an owner of land bordering on a stream against an upper

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riparian owner to enjoin the defendant from polluting the stream and for damages, after, on an appeal by the defendant from an interlocutory decree confirming a master's report and enjoining the defendant as prayed for, this court has ordered a decree for the plaintiff and has given him leave to move for a recommittal of the case to the master for an assessment of damages, and the case has been so recommitted, the only questions open upon such recommittal are questions relating to damages, and the defendant should not be permitted to introduce evidence to show that other persons besides himself caused the pollution complained of. *Parker* v. *American Woolen Co.* 176.

Where a suit in equity is referred to a master "to hear the parties and their evidence forthwith and report his findings to the court together with such facts and questions of law as either party may request," a party has a right to ask the master to report his rulings as to the admission of evidence, and a refusal of the master to report such rulings is a proper ground for recommitting his report. *Cook* v. *Scheffreen*, 444.

Where a party to a suit in equity goes to trial before a master under an order of reference which does not direct the master to report the evidence in whole or in part, this is an acquiescence in leaving the final determination of the facts to the master, and, at least after the findings of the master have come to the knowledge of the parties through his draft report, it is too late to ask as a matter of right that the master be ordered to report the evidence or some part of it. *Ibid.*

Accordingly the denial by a trial judge under such circumstances of a motion to recommit a master's report for such a purpose is a proper exercise of discretionary power. *Ibid.*

In a suit in equity, referred to a master under a rule not requiring him to report the evidence, a certain party, after the master had filed a draft report adverse to him, moved to recommit the case to the master for a report of the evidence, and it was held that a denial of the motion was a proper exercise of the discretion of the trial judge. *Matthews* v. *Colburn*, 571.

Findings of Trial Judge.

In a suit in equity by an automobile dealer against a manufacturer to enforce a contract whereby the plaintiff was appointed the defendant's exclusive agent in a certain territory, findings of a judge as to the meaning of the word "automobile" as used in the contract, and as to whether the plaintiff had waived a certain provision of the contract or had been guilty of laches, were held not to have been clearly wrong. *Wier* v. *American Locomotive Co.* 303.

Decree.

In a suit in equity the confirmation of a master's report by a final decree makes all findings of fact contained in that report conclusive between the parties to the suit, and these matters are none the less *res judicata* if such final decree was entered by the consent of the parties. *C. A. Briggs Co.* v. *National Wafer Co.* 100.

In a suit in equity by an aged widow, seeking to set aside a deed of property made by her to the defendant conditioned upon her comfortable support by the defendant during her lifetime, an interlocutory decree may be made

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ordering the defendant to convey to a certain person as trustee all the property conveyed to him by the plaintiff, to be held by such trustee for the benefit of the plaintiff upon trusts stated in the decree, and, upon the plaintiff's death, to apply any balance of the trust fund in his hands as therein directed in satisfaction of any just debts or expenses incurred under the trust, and to pay the balance then remaining to the plaintiff's executor or administrator. *Rice* v. *Merrill*, 419.

Where the defendant has made a deed to the trustee in accordance with the terms of such a decree, which is accepted by the plaintiff, who enjoys the benefit of the trust until her death more than two years later, the executor of the plaintiff's will, if the circumstances under which the interlocutory decree was made do not appear, cannot be heard to assert that the decree or the trust created by it was invalid. *Ibid.*

Reversal, on an appeal by the plaintiff in a suit in equity to enjoin the defendant from cutting wood on fourteen acres of land alleged to belong to the plaintiff, of a decree giving the defendant affirmative relief, because such relief only could be granted upon a cross bill. *Matthews* v. *Colburn*, 571.

Appeal.

Where, in a suit in equity the final decree awards to the plaintiff a certain sum claimed by him but awards him no interest, on an appeal by the defendant alone, the question, whether the plaintiff should have been awarded interest, is not before this court. *Portuguese Fraternity* v. *Liberty Trust Co.* 27.

Where in a suit in equity the defendant alone appeals from a final decree and the only error which appears upon the record is the awarding of too small a sum to the plaintiff, the decree must be affirmed. *Stevens* v. *Baker*, 30.

On an appeal from a final decree in a suit in equity, where the only question before this court is whether the decree is within the scope of the bill and is supported by the facts found by the master, a statement of facts agreed upon by the counsel in the case can be considered only so far as it appears to embody the evidence that was before the judge who made the decree appealed from. *Kaatz* v. *Curtis*, 311.

Assumption by this court, in determining an appeal from a final decree dismissing a bill in equity, that a certain inference drawn by the judge was from the facts found by him and was not a finding of fact upon conflicting oral evidence; so that, in considering whether the inference was to be drawn, this court stood in the same relation to the question as did the judge who heard the case. *Hurd* v. *General Electric Co.* 358.

In a certain suit in equity, an appeal from a decree overruling exceptions to a master's report, relating to questions of fact on which the evidence, amply reported, was conflicting and irreconcilable, was dismissed because the master's findings to which the exceptions related were not shown plainly to have been erroneous. *Perry* v. *Pye*, 403.

Where on an appeal from a decree in equity dismissing a bill against a number of defendants, in which the plaintiff's principal claim against the defendants was not established, it appeared from the facts in the master's report that the plaintiff had the right to redeem certain securities in the hands of some of the defendants, but, although there was no express disclaimer on the plaintiff's part as to this relief, there were indications in the master's report that the plaintiff did not ask for such redemption, it was held that the decree dis-

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missing the bill would not be reversed on this ground unless the plaintiff moved for the reversal. *Warfield* v. *Adams*, 506.

Reversal, on an appeal by the plaintiff in a suit in equity to enjoin the defendant from cutting wood on fourteen acres of land alleged to belong to the plaintiff, of a decree giving the defendant affirmative relief, because such relief only could be granted upon a cross bill. *Matthews* v. *Colburn*, 571.

Costs.

In a suit in equity in which the plaintiff sought an injunction and an accounting for profits alleged to have been obtained by the wrongful acts of the defendant, and the plaintiff established his right to an injunction only as to a part of the acts of the defendant alleged to have been wrongful, and the defendant was shown to have derived no profits from such wrongful acts, costs were awarded to the plaintiff, although he had shown himself to be entitled only to a part of the relief prayed for in his bill, because a part of the defendant's conduct, which the defendant attempted to justify, had been that of a wrongdoer. *C. A. Briggs Co.* v. *National Wafer Co.* 100.

ESTOPPEL.

If an owner in common of certain land, in partition proceedings in the Probate Court instituted by him, makes no claim before the commissioners to the effect that a barn on the land belongs to him, and with his assent a decree is made setting off the land and barn to another, he is estopped thereafter to claim the barn as personal property belonging to him. *Cutter* v. *Cutter*, 24.

In an action by a railroad corporation against the consignee of goods, who received them from the plaintiff under a bill of lading by which he agreed to pay the freight rates established under the interstate commerce act, to recover a balance of the freight charges, which had not been claimed at the time of the delivery of the goods by reason of an erroneous classification that was not discovered until several months later, the defense of estoppel was held not to be open. *New York, New Haven, & Hartford Railroad* v. *York & Whitney Co.* 36.

A levy and sale upon an execution of "all" the "right, title and interest" of the debtor in certain real estate described in the execution deed by metes and bounds, where the debtor's title in the real estate described is as one of several heirs of one who had died seised of several other parcels of real estate as well as the one described, while of no effect without the consent of the other heirs, is effectual, in case a portion of the premises described subsequently is set off to the judgment debtor in partition proceedings, to establish a title by estoppel in the purchaser at the sale to such interest in the portion thus set off by partition as was the judgment debtor's at the time of the sale. *Cressey* v. *Cressey*, 65.

Failure of the assessors of a town to assess for taxation to an executor on April 1 certain property known to the assessors, which such executor insisted was not taxable to him as executor because, as asserted by him, he had distributed it within the meaning of St. 1909, c. 490, Part I, § 23, cl. 7, in no way estops the assessors from performing their duty by assessing the

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property to the executor on December 19 under § 85 of the same statute as property that "has been omitted from the annual assessment of taxes." *Sears* v. *Nahant*, 329.

EVIDENCE.

Presumptions and Burden of Proof.

For cases involving the principle of *res ipsa loquitur*, see NEGLIGENCE, *Res ipsa loquitur*.

In the absence of clear proof there is a presumption of fact that a person found dead did not commit suicide. *Bohaker* v. *Travelers Ins. Co.* 32.

In an action on a policy of accident insurance to recover for the death of the insured from accidental bodily injuries, where the policy contains a provision that "suicide whether sane or insane is not covered," and it appears that at the time of the accident, which was seen by no one, the insured was delirious by reason of severe typhoid fever, although the burden may be upon the plaintiff to prove that the death of the insured was not due to suicide, yet in the absence of evidence of suicide this burden may be found to have been sustained by the presumption of fact against self destruction. *Ibid.*

In an action for damages caused by the shying of a horse which the defendant had bought three days before the accident as a "green horse," the jury may assume as a matter of common knowledge that a "green horse" is one understood to be fresh from the country and entirely unwonted to the distracting conditions of the business streets of a great city. *Raymond Syndicate* v. *American Express Co.* 140.

The mere fact of the disappearance of several instruments of a testamentary nature, which were executed by a testator after the making of a will which was offered for probate, in the absence of any contention that they had been taken from the testator's possession or were among his papers at his death, raises a presumption of fact that the testator destroyed them with an intention to revoke them. *Aldrich* v. *Aldrich*, 164.

Allowance of an amendment to a declaration, which was held to be conclusive evidence of the identity of the cause of action. *Polvere* v. *Hugh Nawn Contracting Co.* 199.

At the trial of an action against a street railway company to recover for personal injuries sustained by a girl eight and one fourth years of age from a car of the defendant running into her as, at a place other than a cross walk, where the sidewalk was sixteen to eighteen feet from the car track, she was crossing a street when she saw the car something over one hundred feet away, the defendant is entitled to have the jury instructed that the plaintiff had "no right to assume that the motorman would look out for her safety to the extent that she was relieved from taking any precautions whatever for her own safety while walking a distance of sixteen to eighteen feet." *Sheehan* v. *Boston & Northern Street Railway*, 463.

In an action against a street railway company for causing the death of the plaintiff's intestate, who was driving a pair of horses attached to a cart from an intersecting street across a track of the defendant, when his cart was struck by a car moving at an excessive rate of speed, the jury from their experience and common knowledge may infer that the intestate did

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not intend deliberately to expose himself and his employer's property to the chance of injury by attempting to pass in front of an approaching car when it was so near that a collision appeared to be unavoidable. *Scanlon* v. *Berkshire Street Railway*, 554.

In an action for the breach of a contract to purchase milk from the plaintiff for a year, where it appeared that the action was brought within three and one half months after the contract was made, and where there was evidence that the plaintiff, after a refusal of the defendant to take his milk further, sold it to another person, it was held that, in the absence of anything to the contrary, the jury were warranted in assuming that the price received from such other dealer was the best price obtainable for the milk during the period in question. *Raymond* v. *Phipps*, 559.

Action of tort for damages resulting from a collision of automobiles of the plaintiff and of the defendant in Vermont, at the trial of which it appeared that, in violation of statutes of Vermont, the plaintiff's automobile was not registered and its operator was not licensed, and it was held that, in the absence of evidence of the common law of Vermont as to the effect of a violation of such statutes, it must be presumed to be the same as that of this Commonwealth. *Holden* v. *McGillicuddy*, 563.

In an action at law a general finding by a judge sitting without a jury, like the verdict of a jury, cannot be revised upon questions of fact if it was warranted by the evidence. *New York, New Haven, & Hartford Railroad* v. *York & Whitney Co.* 36.

In an action of contract, where a substantial part of the evidence is oral or consists of inferences to be drawn from the circumstances shown, it seldom can be ruled that the party on whom the burden of proof rests is entitled to a verdict. *Coleman* v. *New York, New Haven, & Hartford Railroad*, 45.

It is proper for a judge presiding at a trial to refuse a request for an instruction to the jury, that where "witnesses of equal candor, fairness and intelligence testify with equal opportunity of knowledge and memory, and their testimony is in all respects of equal weight and credibility and there is a conflict as to facts which cannot be reconciled, the number of witnesses then constitutes a preponderance and the verdict should be in harmony with the greater number of witnesses," if such a ruling is inapplicable to the facts because the witnesses did not have an equal opportunity of observation. *Gray* v. *Boston Elevated Railway*, 143.

In an action for personal injuries sustained by the plaintiff in the employ of the defendant, if the defense that the plaintiff assumed the risk of the injury is set up in the answer, the burden is on the defendant to prove it. *Oswald* v. *Donohue*, 574.

Matters of Common Knowledge.

In an action for damages caused by the shying of a horse which the defendant had bought three days before the accident as a "green horse," the jury may assume as a matter of common knowledge that a "green horse" is one understood to be fresh from the country and entirely unwonted to the distracting conditions of the business streets of a great city. *Raymond Syndicate* v. *Express Co.* 140.

In an action against a street railway company for causing the death of the plaintiff's intestate, who was driving a pair of horses attached to a cart

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from an intersecting street across a track of the defendant, when his cart was struck by a car moving at an excessive rate of speed, the jury from their experience and common knowledge may infer that the intestate did not intend deliberately to expose himself and his employer's property to the chance of injury by attempting to pass in front of an approaching car when it was so near that a collision appeared to be unavoidable. *Scanlon* v. *Berkshire Street Railway*, 554.

Admissions.

Argument by the plaintiff's counsel at the trial of an action against a street railway company for personal injuries and death, which was predicated on an assumption that the defendant had not produced witnesses to the accident whom it could have produced, and which was held under the circumstances to have been unfair and unwarranted by the evidence. *Buckley* v. *Boston Elevated Railway*, 50.

At the trial, on an appeal from a decree of the Probate Court allowing a will, of an issue, whether the will was procured by undue influence of the testator's widow, who was named as executrix, the widow, although a beneficiary under the will, is not an adverse party, and her failure to testify in support of the will is not evidence from which an inference can be drawn that, if she had testified, her testimony would have tended to prove the will invalid. *Aldrich* v. *Aldrich*, 164.

Absence of Witness.

At the trial of an action against a street railway company for personal injuries received by a passenger, a claim investigator employed by the defendant, who had stated in cross-examination that several persons, whose names were on a report of the accident made by the conductor of the car upon which the plaintiff was a passenger, had not been summoned as witnesses by the defendant, may be asked in redirect examination his reason for not summoning them and may state that they wrote to him stating that they knew nothing about the accident. *Callahan* v. *Boston Elevated Railway*, 171.

Argument by the plaintiff's counsel at the trial of an action against a street railway company for personal injuries and death, which was predicated on an assumption that the defendant had not produced witnesses to the accident whom it could have produced, and which was held under the circumstances to have been unfair and unwarranted by the evidence. *Buckley* v. *Boston Elevated Railway*, 50.

Contradictory Statement at previous Hearing.

Where, at a trial in the Superior Court, the defendant offers in evidence, for the sole purpose of contradicting a certain statement made by a witness for the plaintiff, a statement to the contrary previously made by the witness when testifying at an inquest, and at the demand of the plaintiff the entire testimony of the witness at the inquest is introduced in evidence, the plaintiff cannot rely on a sentence therein, which does not relate to the subject matter of the testimony in the Superior Court which the defendant

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is seeking to contradict, to prove affirmatively the facts that were testified to in such sentence. *Bothwell* v. *Boston Elevated Railway*, 467.

Competency.

Where, at the trial of a petition against a railroad corporation by a manufacturing corporation for damages resulting from the abolition of a grade crossing of the railroad with a way, the petitioner at the request of the respondent has produced its books and they have been examined by an expert in behalf of the respondent, one who was the secretary of the petitioner during the period covered by the books may be allowed to testify as to their contents. *Cornell-Andrews Smelting Co.* v. *Boston & Providence Railroad*, 381.

Opinion: Experts.

Comment of a bystander at the time of an accident which, it was held, was not evidence on the question of the plaintiff's due care. *Gray* v. *Boston Elevated Railway*, 143.

At the trial of a petition for damages resulting from the abolition of a grade crossing of a railroad and a private way, where the value of certain buildings is an issue, an experienced builder who constructed the buildings may be permitted in the discretion of the judge to testify as an expert as to their value at the time of their erection and at the time of the decree of court abolishing the crossing, which was four years later, although he is not acquainted with the value of real estate in the town where they are situated. *Cornell-Andrews Smelting Co.* v. *Boston & Providence Railroad*, 381.

At such trial the petitioner contended and offered evidence tending to show that, by the discontinuance of a private way because of the work in connection with the abolition of the crossing, operation of its plant was rendered impossible and its machinery and buildings were rendered worthless, and expert witnesses, testifying in its behalf, were asked, and were held rightly to have been permitted to answer questions relating to the existence or non-existence of other factories in New England engaged in rolling, smelting and refining. *Ibid.*

Res gestæ.

Comment of a bystander at the time of an accident which, it was held, was not evidence on the question of the plaintiff's due care. *Gray* v. *Boston Elevated Railway*, 143.

Extrinsic affecting Writings.

Evidence is not admissible at the trial of an action for rent due under a lease in writing, to show that the tenant agreed to a higher rent than that first proposed, in consideration of the landlord's orally agreeing to build a veranda, which he afterwards refused to build. *Spear* v. *Hardon*, 89.

Upon the question, whether a right of way defined in a deed by ambiguous words was over a proposed private street only so far as such street should adjoin the land conveyed or whether the easement extended over a prolongation of the proposed street upon other land of the grantor, the acts of a subsequent owner of such other land more than eight years after the making of the deed to be interpreted have no bearing on the meaning of the doubtful language of that deed. *Hurd* v. *General Electric Co.* 358.

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In an action brought on behalf of one indorser of a note against one of two other indorsers, the defendant may be allowed to show that the indorsements were for accommodation and that by an oral agreement among the indorsers his liability in no event was to exceed one third of the amount at any time due on the note; and if such an agreement is proved, his liability is governed thereby irrespective of the order in which the indorsers signed the note. *Shea* v. *Vahey*, 80.

The words of a contract in writing, made between the parties to a previous contract in writing for the construction of a building, which recited that a controversy had arisen between the parties as to the amount due upon the previous contract and provided that the contractor should accept and the owner should pay $35,000 in full settlement of all claims, whereof $25,000 should be paid forthwith and the balance should be paid as provided by the terms of the first contract, were held not to be plain as to the conditions governing the payment of the $10,000, so that evidence should have been admitted to show their true meaning as relating to a former contract that had not been completed. *Whidden & Co.* v. *Jordan*, 189.

In an action of contract for a sum of money alleged to be due to the plaintiff, where the sole defense relied upon is a release in writing given by the plaintiff to the defendant and alleged by the defendant to include the plaintiff's present claim, if there is no ambiguity in the terms of the instrument, evidence of what was said in the negotiations that resulted in the execution and delivery of the release, although admitted without objection, cannot be considered in interpreting its meaning, and whether the defendant asked for a "full release" and the plaintiff agreed to give such release is of no consequence. *Rochester Tumbler Works* v. *Mitchell Woodbury Co.* 194.

Res inter Alios.

In an action of tort for personal injuries, the defendant should not be allowed to show in reduction of damages that the plaintiff received money under a policy of accident insurance by reason of his injuries, the transactions between an insurance company and the plaintiff having no bearing on the extent of his injuries nor upon the defendant's liability for them. *Gray* v. *Boston Elevated Railway*, 143.

Remoteness.

In an action against a street railway company for injuries to a boy ten years of age who was riding a bicycle down a street with a sharp grade crossed at its foot by a track of the defendant, it was held that certain evidence of what the plaintiff's mother "quite a while before" had said to him about riding down the street, well might have been excluded on the ground that it was too remote. *Bosquet* v. *Worcester Consolidated Street Railway*, 538.

At the trial, on appeal from a decree of the Probate Court allowing a will, of an issue, whether the will was procured by undue influence, the appellee being the testator's wife by a second marriage and the appellant being one of several children of the testator, all by his first marriage, an exception to the exclusion of evidence tending to show that the appellant's mother had stated to him in the presence of the testator and the appellee that she had caught them in illicit relations, and that the appellant thereupon ordered the appellee from the house, was overruled because no foundation

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had been laid for the evidence, and because the time to which the evidence related was so remote that its exclusion as a matter of discretion could not be deemed improper. *Aldrich* v. *Aldrich*, 164.

Best Evidence.

Whether facts stated in an agreed statement of facts in a certain action would be competent evidence to controvert a statement of facts appended by the Secretary of State as a note to the official printed copy of a statute, was not decided. *Tuttle* v. *Boston*, 57.

In a suit in equity by a corporation, upon a question of the loss of profits to the plaintiff, the plaintiff's secretary and general manager may be allowed to testify from memory as to the cost of production and the selling price of the goods produced by the plaintiff, if he is testifying from his personal knowledge, although books and records kept by the witness contain written statements of the same facts, and although he is unable to recall certain items of expense which entered into the cost of the goods. *Forster Manuf. Co.* v. *Cutter-Tower Co.* 136.

Where, at the trial of a petition against a railroad corporation by a manufacturing corporation for damages resulting from the abolition of a grade crossing of the railroad with a way, the petitioner at the request of the respondent has produced its books and they have been examined by an expert in behalf of the respondent, one who was the secretary of the petitioner during the period covered by the books may be allowed to testify as to their contents. *Cornell-Andrews Smelting Co.* v. *Boston & Providence Railroad*, 381.

Relevancy and Materiality.

When, in an action for libel, evidence of the character and reputation of the plaintiff is admissible, see *Stearns* v. *Long*, 152.

Evidence which was held to be competent, in an action by a woman for an alleged breach of a contract in writing to furnish her with board and food during her life and also to pay her $10 monthly, as tending to show that the defendant had not furnished the plaintiff with food as he agreed to and that the plaintiff was justified in leaving his house and in not going there for food. *Soderlund* v. *Helman*, 542.

Evidence of the fair market price per week of a woman's board was held to be admissible in such action, upon the question of damages, as tending to show the fair value of the food that the defendant failed to furnish. *Ibid.*

At the trial of an action for the breach of a contract to purchase milk from the plaintiff for a year, where it does not appear that the parties made any agreement as to the ownership of the milk, it is not material whether the plaintiff had any financial interest in the milk that he was shipping to the defendant, and evidence on that question is not admissible. *Raymond* v. *Phipps*, 559.

Nor, in the absence of any contention by the defendant that the contract was made by the plaintiff as a member of a partnership and for the partnership's benefit, is evidence admissible to show that, at the time of the making of the contract, the plaintiff and a third person were "in partnership." *Ibid.*

In an action for the breach of a contract to purchase milk from the plaintiff for a year, where it appears that the action was brought within three and

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one half months after the contract was made, evidence of a price for which the plaintiff, after the refusal of the defendant to take his milk further, sold it to another person, is admissible for the purpose of showing the profits which the plaintiff would have realized from the complete performance of the contract by the defendant and the loss which he sustained from the breach of that contract. *Raymond* v. *Phipps*, 559.

Declarations of Deceased Persons.

Where a declaration of a deceased person is offered in evidence under R. L. c. 175, § 66, the presiding judge, while conducting a preliminary examination for the purpose of determining whether the declaration offered was made by the declarant under the conditions required by the statute, may direct that the jury be retired out of hearing. *Slotofski* v. *Boston Elevated Railway*, 318.

In an action for the suffering and death of the plaintiff's intestate caused by a fall from a street railway car operated by the defendant's servants, if the judge refuses to find that certain declarations of the intestate, as to the way in which the accident occurred, were made at all, because he does not believe that a man whose brain had received such a concussion could or did make such statements, such preliminary decision is final and the alleged declarations must be excluded. *Ibid.*

Under R. L. c. 175, § 66, a declaration of a deceased workman, who had come to this country eighteen months before the accident that caused his death, that his elderly parents, whom he left in the country of his birth, were in need of the money that he sent to them from his wages earned here, may be found to have been based on facts known to the declarant before he left the foreign country and thus to have been made upon his personal knowledge. *Polvere* v. *Hugh Nawn Construction Co.* 199.

Testimony in an action under the employers' liability act for causing the death of a workman of the defendant, as to a statement by the workman that his parents in Italy were in need of money because they did not get any money from the crops, that their farm was bad, and that "the crops had come and there was not enough to pay the interest for hiring the place," was held to refer to crops after the deceased workman had left Italy so that his declaration concerning them could not have been made upon his personal knowledge and should have been excluded under R. L. c. 175, § 66. *Ibid.*

Official Records.

Whether facts stated in an agreed statement of facts in a certain action would be competent evidence to controvert a statement of facts appended by the Secretary of State as a note to the official copy of a statute, was not decided. *Tuttle* v. *Boston*, 57.

In an action for personal injuries against a corporation operating a street railway in a city, where the date of the oiling of a street was material, a record of that fact, kept by a foreman of the street department of the city, who testified after refreshing his recollection from the record, was held properly to have been excluded, as it did not appear that the writing was anything more than a memorandum made by the witness for the information of his superiors. *Gray* v. *Boston Elevated Railway*, 143.

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Official Copies.

A copy of the by-laws of an unincorporated foreign beneficiary association, which R. L. c. 119, § 12, as amended by Sts. 1903, c. 332; 1909, c. 407, provides shall be filed with the insurance commissioner whenever he shall so require in writing upon a claim of such association to be exempt from the provisions of R. L. c. 119, is not made by that statute alone or in connection with R. L. c. 175, § 74, competent as evidence in place of the original. *Commonwealth* v. *Merrill*, 204.

In the present case a document purporting to be a copy of the constitution of an unincorporated foreign beneficiary association, which was held to have been admitted in evidence erroneously, was shown to have been received by the insurance commissioner when requested by him but before the association had made any claim to exemption from the provisions of R. L. c. 119. *Ibid.*

Ancient Plans.

Upon the trial of a question as to a boundary of real estate, an ancient plan, produced from proper custody, purporting to be a plan or an office copy of a plan made by a well known surveyor of the day, which is proved to have been used in some transaction with a third person by a predecessor in title of the party offering it in evidence to show the land then claimed by him, properly may be admitted in evidence, although such plan is without the signature of any maker and there is no evidence to indicate whether it is an original or a copy. *Brown* v. *Metcalf*, 289.

Foreign Law.

Action of tort for damages resulting from a collision of automobiles of the plaintiff and of the defendant in Vermont, at the trial of which it appeared that, in violation of statutes of Vermont, the plaintiff's automobile was not registered and its operator was not licensed, and it was held that, in the absence of evidence of the common law of Vermont as to the effect of a violation of such statutes, it must be presumed to be the same as that of this Commonwealth. *Holden* v. *McGillicuddy*, 563.

Of Character and Reputation.

In an action for libel brought by the chairman of the licensing board of a city against the publisher of a newspaper, alleging libellous statements that the plaintiff and his associates on the board had failed to enforce the law relating to sales of intoxicating liquors, evidence of the plaintiff's reputation for good character was held to have been excluded properly upon the issue of liability because the language used by the defendant did not impute any act punishable criminally. *Stearns* v. *Long*, 152.

In the same case, it was said that it was an open question whether in this Commonwealth, where the defendant in an action for libel under a plea of justification asserts and undertakes to prove that the plaintiff was guilty of acts punishable as crimes, the plaintiff may rebut such proof by evidence of good character and reputation. *Ibid.*

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Of Identity of Cause of Action.

Allowance of an amendment to a declaration, which was held to be conclusive evidence of the identity of the cause of action. *Polvere* v. *Hugh Nawn Construction Co.* 199.

Of Profits.

In an action for the breach of a contract to purchase milk from the plaintiff for a year, where it appears that the action was brought within three and one half months after the contract was made, evidence of a price for which the plaintiff, after the refusal of the defendant to take his milk further, sold it to another person, is admissible for the purpose of showing the profits which the plaintiff would have realized from the complete performance of the contract by the defendant and the loss which he sustained from the breach of that contract. *Raymond* v. *Phipps*, 559.

And, in the absence of anything to the contrary, the jury are warranted in assuming that the price received from such other dealer was the best price obtainable for the milk during the period in question. *Ibid.*

Of Right to Possession.

In an action against a carrier for an alleged conversion of goods, if it appears that the plaintiff was named as consignee in the bill of lading of the goods and that he had possession of the bill of lading, this is evidence of the plaintiff's right to the immediate possession of the goods. *Coleman* v. *New York, New Haven, & Hartford Railroad*, 45.

Of State of Mind.

At the trial of an issue, whether an instrument offered for probate as a will had been revoked, evidence that one of a firm of attorneys who had acted for the testator in drawing various wills, when handing to the testator within three months before his death the instrument offered for probate, stated to him that his, the attorney's, partner was under the impression that there was another will, and that the testator, after a very careful examination of the will, stated, "No, this is the one, this is the one I want," and then laid the will down on the bed by his side, where the witness left it, was held to have been admissible as tending to show an intention of the testator to destroy the wills that could not be found and to revive, or to select, the will offered for probate. *Aldrich* v. *Aldrich*, 164.

Of Truth of Alleged Libel.

Action of the Superior Court, reversing, on a review under R. L. c. 100, § 4, of a decision by the mayor of a city removing the members of the licensing board, and finding that the chairman was not guilty of any violation of law, will not prevent a report in writing, made to the board by police officers and stating violations of the law by various innkeepers, from being introduced in evidence in behalf of the defendant in an action of libel against the proprietor of a newspaper for the publication of statements of laxity of the board, such report tending to show the truth of the statements contained in the alleged libel. *Stearns* v. *Long*, 152.

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Of Undue Influence.

At the trial, on appeal from a decree of the Probate Court allowing a will, of an issue, whether the will was procured by undue influence, the appellee being the testator's wife by a second marriage and the appellant being one of several children of the testator, all by his first marriage, an exception to the exclusion of evidence tending to show that the appellant's mother had stated to him in the presence of the testator and the appellee that she had caught them in illicit relations, and that the appellant thereupon ordered the appellee from the house, was overruled because no foundation had been laid for the evidence, and because the time to which the evidence related was so remote that its exclusion as a matter of discretion could not be deemed improper. *Aldrich* v. *Aldrich*, 164.

Of Value.

At the trial of a petition for damages resulting from the abolition of a grade crossing of a railroad and a private way, where the value of certain buildings is an issue, an experienced builder who constructed the buildings may be permitted in the discretion of the judge to testify as an expert as to their value at the time of their erection and at the time of the decree of court abolishing the crossing, which was four years later, although he is not acquainted with the value of real estate in the town where they are situated. *Cornell-Andrews Smelting Co.* v. *Boston & Providence Railroad*, 381.

Admitted for Limited Purpose.

A self-serving statement, which in itself would be inadmissible but which is material for the purpose of showing the date at which the assertion contained in it was made, properly may be admitted in evidence if its consideration is limited strictly to the single purpose for which it is material. *Perry* v. *Pye*, 403.

Self-serving Statement.

A self-serving statement, which in itself would be inadmissible but which is material for the purpose of showing the date at which the assertion contained in it was made, properly may be admitted in evidence if its consideration is limited strictly to the single purpose for which it is material. *Perry* v. *Pye*, 403.

Res ipsa loquitur.

See that subtitle under NEGLIGENCE.

EXECUTION.

A levy and sale upon an execution of "all" the "right, title, and interest" of the debtor in certain real estate described in the execution deed by metes and bounds, where the debtor's title in the real estate described is as one of several heirs of one who had died seised of several other parcels of real estate as well as the one described, while of no effect without the consent of the other heirs, is effectual, in case a portion of the premises described subsequently is set off to the judgment debtor in partition proceedings, to estab-

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lish a title by estoppel in the purchaser at the sale to such interest in the portion thus set off by partition as was the judgment debtor's at the time of the sale. *Cressey* v. *Cressey*, 65.

Nature of execution which should issue in case of a judgment for the plaintiff in an action against the surety on a probate bond of a trustee. *Harmon* v. *Weston*, 242.

Where, in an action on a probate bond, judgment is entered for the penal sum of the bond with interest thereon, if the amount for which execution properly should issue exceeds such penal sum, the allowance of interest is correct as compensation for the wrongful detention of the money. *Ibid.*

And, even if the amount for which execution is to issue does not exceed such penal sum, it cannot be said that the defendant is harmed by the allowance of interest in the entry of judgment, for he can be held only for the amount for which execution is to issue. *Ibid.*

In an action on a probate bond given by one of two trustees, in which judgment had been obtained against the defendant surety because of a misappropriation of trust funds by the trustee for whom the defendant was surety, it appeared that the two trustees were entitled to the whole income of the trust during their lives, and, because of an agreement as to subrogation made by them with the defendant, it was held that the defendant was subrogated to the rights of the two principals to receive the income from the entire trust fund for the period between the time of the misappropriation and the time of the death of the other trustee, and that, therefore, to avoid circuity of action, the income of the part of the trust fund that had been misappropriated would be regarded as fully accounted for by the trustees, and was not to be included in the amount for which execution was to issue. *Ibid.*

Surety on the probate bond of one of two trustees was held not to have any right in the principal of the trust by reason of subrogation to rights of the other trustee, who had as to the principal merely a power of appointment by will over a certain portion of the principal of the trust. *Ibid.*

EXECUTOR AND ADMINISTRATOR.

Survival of Actions and Rights.

An executor cannot maintain an action of tort for false representations made to his testator who relied upon them to his loss, a loss thus incurred not being "damage to real or personal property" for which an action survives under R. L. c. 171, § 1. *Rockwell* v. *Furness*, 557.

The expenditure of money by an executor upon the prosecution of an action for an alleged wrong done to his testator under the mistaken belief that the right of action survives under R. L. c. 171, § 1, when it is not within that statute, has no effect to revive the extinct cause of action. *Ibid.*

In an action of tort by an executor for an alleged wrong done to his testator, the defense that the right of action died with the testator and did not survive to the executor under R. L. c. 171, § 1, is available under an answer which contains only a general denial. *Ibid.*

Leasehold interest was held to pass to the administrator of the estate of the lessee. *Johnson* v. *Stone*, 219.

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Limitation of Action.

In a suit in equity by a foreign corporation under R. L. c. 141, §§ 26, 27, against the devisees and legatees under the will of a deceased subscriber for shares of stock of the plaintiff, for the collection of a call of £1 a share, it appeared that the call had not been made until after the settlement of the estate of the deceased subscriber and after the expiration of the two years' period of limitation, and that, before the expiration of such period, the necessity for and probability of a call upon the actual subscribers must have been apparent to the plaintiff's directors, and it was held that the suit could not be maintained because under R. L. c. 141, § 13, the plaintiff's claim could legally have been presented to the Probate Court before the estate was fully administered as one that might become justly due from the estate. *Electric Welding Co.* v. *Fitz*, 315.

In a suit in equity by a member of a partnership, which had been composed of three persons, against the widow of one of the three partners, personally and as the executrix of his will under which she was the sole legatee and devisee, alleging that upon an accounting, by reason of a mutual mistake of fact made by all the parties through their common agent, the defendant received much more than her share of the partnership assets, and seeking to recover such excess from her personally, R. L. c. 141, § 9, limiting actions against an executor or administrator, is no defense. *Bowker* v. *Torrey*, 547.

Ancillary Administration.

An ancillary administrator, appointed in another State to administer the estate in that State of a testator whose domicil at the time of his death was in this Commonwealth and whose will was proved here, is in no sense the agent of the executor of the will in this Commonwealth, and within the jurisdiction of his appointment his authority is independent and exclusive. *Gray* v. *Lenox*, 598.

Certain classes of property, which, it was held, an ancillary executor, appointed in this Commonwealth, of the will of a non-resident, which also was proved in the State in which the testator had his domicil, should administer under R. L. c. 143, as estate of his testator "found here." *Kennedy* v. *Hodges*, 112.

Shares of stock in foreign corporations owned by the testator at the time of his death and represented by certificates in safe deposit box in this Commonwealth are not found "here" within the meaning of R. L. c. 143, and should not be administered under the provisions of that statute. *Ibid.*

Taxation.

Various principles of law determined as to the application of St. 1909, c. 490, Part I, §§ 49, 85, to taxation of property in the hands of an executor of which he had made no return as executor. *Sears* v. *Nahant*, 329.

Where a person who is the executor of a will is also the trustee thereunder, the personal property held by him as executor is to be assessed for taxation to him as executor until, under St. 1909, c. 490, Part I, § 23, cl. 7, he has made a distribution to himself as trustee which has been allowed by the Probate Court; and his giving notice to the assessors, in accordance with the requirement of that clause, of a distribution by him as executor does not

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constitute such a distribution. Following Welch v. Boston, 211 Mass. 178. *Sears* v. *Nahant*, 329.

The provision of St. 1909, c. 490, Part I, § 23, cl. 7, that personal property of a deceased person shall be assessed to the executor or administrator for three years or until it has been distributed and notice of such distribution has been given to the assessors, has no application to property which is not within the ownership, possession or control of the executor. *Gray* v. *Lenox*, 598.

FIRE.

Insurance against loss by fire, see INSURANCE, *Fire*.

FORGERY.

UTTERING FORGED ORDER FOR MONEY, see that title.

FRATERNAL BENEFICIARY CORPORATION.

R. L. c. 119, § 13, providing for the filing with the insurance commissioner by a foreign fraternal beneficiary corporation of a copy of its constitution, before this statute was amended by St. 1911, c. 628, § 16, did not apply to unincorporated foreign beneficiary associations. *Commonwealth* v. *Merrill*, 204.

Consequently, if a copy of the constitution of such an unincorporated association was filed under that statute, it did not become a public record, of which by R. L. c. 175, § 74, an attested copy would be competent evidence in all cases where the original would have been competent. *Ibid.*

R. L. c. 119, § 11, amended by St. 1908, c. 463, does not authorize a fraternal beneficiary corporation to transfer its membership to a council of a corporation organized under the laws of another State. In the present case, if the statute had been applicable, the attempted transfer would have been of no effect, because it did not appear that the requirements of the statute had been complied with. *Conseil Rochambeau, No. 128* v. *Lafleur*, 347.

An injunction, issued on an information filed by the Attorney General under R. L. c. 119, § 19, against a foreign fraternal beneficiary corporation, enjoining it "from prosecuting any business of such corporation within this Commonwealth," excuses the corporation from levying an assessment to procure funds with which to pay a death benefit due by reason of the death of a member after the injunction had issued, although after such death the injunction was modified to permit the corporation to defend actions brought against it and "to pay such claims as are now pending against it." *Moshens* v. *Independent Order Ahawas Israel*, 185.

FRAUD.

Suits in equity to relieve from results of fraud, see EQUITY JURISDICTION, *To relieve from Results of Fraud*.

FRAUDS, STATUTE OF.

In an action for a breach of a contract to purchase milk from the plaintiff for a year, where the evidence of the plaintiff at the trial tended to show that

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in a conversation the defendant agreed to take milk from the plaintiff for a year, no mention being made as to when the year should begin, a certain instruction, given in the judge's charge as to a defense of the statute of frauds, was held to have covered all that the defendant asked for in a certain request for a ruling, so that no harm was done by a refusal to give the ruling in the form in which it was requested. *Raymond* v. *Phipps*, 559.

GARAGE.

The enactment of an ordinance by a city under authority of R. L. c. 104, § 1, providing that "no building shall be erected for or converted to use as a garage unless such use is previously authorized by the board of aldermen," is a valid exercise of the police power which does not exceed the scope of the statute. *Storer* v. *Downey*, 273.

GAS COMPANY.

As was pointed out in Weld *v.* Edison Electric Illuminating Co. 197 Mass. 556, the policy which has been developed in Massachusetts respecting the furnishing of artificial light is that of a regulated monopoly. By RUGG, C. J. *Attorney General* v. *Haverhill Gas Light Co.* 394.

A corporation, created by or organized under the laws of this Commonwealth for the purpose of manufacturing and selling gas for light and heat in a certain city, is a public service corporation, and, except by legislative authority, cannot part with its franchise and property in such a way as to deprive itself of the power to perform its public duties. *Ibid.*

R. L. c. 121, § 13, re-enacting in substance St. 1886, c. 346, § 4, and providing that "a gas company shall not transfer its franchise, lease its works or contract with any person, association or corporation to carry on its works, without the authority of the General Court," is constitutional. *Ibid.*

The word "franchise" as used in that statute means the right to manufacture and supply gas for a particular locality and to exercise the special rights and privileges in the streets and elsewhere which are essential to a gas company for the proper performance of its public duty and for the private gain without which it could not exist successfully. *Ibid.*

A sale by a gas company, authorized by its charter to manufacture and sell gas in a certain city, of all its physical property, including its mains and pipes in public ways, to a corporation organized for the purpose of taking over such property under a general scheme for improving the facilities for providing gas for that city, with the understanding that the selling corporation shall surrender its charter after the sale, was held to be an attempted evasion of that statute, and of no effect without legislative authority. *Ibid.*

GOVERNOR.

The Governor has not returned a bill of which he does not approve to the branch of the Legislature in which it originated with his objections thereto in writing within five days as required by c. 1, § 1, art. 2 of the Constitution in order to make his veto effectual, if on the fifth day his veto message is placed upon the desk of the clerk of that branch of the Legislature after the

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end of the legislative session for that day and after the office of the clerk has been closed in the ordinary and reasonable course of business and the clerk and his assistants have departed. *Tuttle* v. *Boston*, 57.

GRADE CROSSING.

Various rulings as to procedure and the assessment of damages and evidence in a petition by a lessee of land against a railroad corporation for damages resulting from the abolition of a grade crossing of a private way with the railroad, where the lessor was admitted as an intervening petitioner. *Cornell-Andrews Smelting Co.* v. *Boston & Providence Railroad*, 381.

HIGHWAY.

See WAY, *Public*.

HUSBAND AND WIFE.

Where a married woman has recovered judgment against a railroad corporation in an action for personal injuries caused by a collision of trains, her husband, in a subsequent action against the railroad corporation for consequential damages caused to him by her injuries, can recover nothing for loss of consortium. Following Bolger *v.* Boston Elevated Railway, 205 Mass. 420. *Whitcomb* v. *New York, New Haven, & Hartford Railroad*, 440.

In an action against a widow on a promissory note signed by her during her husband's lifetime and made payable to the plaintiff, who was her husband's brother, there was evidence warranting findings that the defendant, having property which equitably belonged to her husband, in order to make sure that his children by a former wife should share in this property, at the request of her husband made the note payable to the plaintiff, who agreed to act as trustee for such children, and delivered the note to her husband to be kept by him as the agent of the plaintiff as such trustee; and it was held that on these facts it could be found that there was a good delivery of the note to the payee and that it was given for a valid consideration. *Crosier* v. *Crosier*, 535.

ICE.

See SNOW AND ICE.

INSOLVENCY.

The insolvency of a consignee of goods which is necessary to give the consignor the right of stoppage *in transitu* need not be shown by proof of adjudication, but consists simply of inability to pay debts in the usual course of business, and may be proved as a rational inference from convincing facts and circumstances. *Coleman* v. *New York, New Haven, & Hartford Railroad*, 45.

Evidence which, it was held, would warrant a finding that the consignee was insolvent. *Ibid.*

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INSURANCE.

Fire.

Discussion by LORING, J., of the history and purpose of the statutes, which resulted in St. 1887, c. 214, § 60, now St. 1907, c. 576, § 60, establishing the present Massachusetts standard form of fire insurance policy, especially in relation to the clause providing for the determination of the amount of the loss by referees. *Hanley* v. *Ætna Ins. Co.* 425.

Discussion by LORING, J., of the cases in other jurisdictions upon the question whether referees to determine the amount of a loss by fire under a clause in a policy of insurance similar to that contained in the Massachusetts standard form of policy should sit as a *quasi* court and make their determination on evidence presented by the respective parties or whether they should ascertain the facts in any fair way satisfactory to themselves. *Ibid.*

Referees appointed to determine the amount of a loss by fire under the Massachusetts standard form of fire insurance policy, set forth in St. 1907, c. 576, § 60, may determine the amount of such loss in any way that in the exercise of an honest discretion they may think wise, and their award will not be made invalid by a refusal in good faith to hear evidence offered by the insurance company as to the amount of the loss. *Ibid.*

In an action on a policy of insurance against fire in the Massachusetts standard form, where the defendant relies on the defense that the award of the referees as to the amount of loss was invalid because the referees had refused to hear evidence offered by the defendant, the burden is on the defendant to show that the evidence excluded was material and that the defendant has been harmed by the exclusion. *Ibid.*

In deciding that the referees, appointed to determine the amount of a loss by fire under the Massachusetts standard form of fire insurance policy, may determine the amount of such loss in any way that in the exercise of an honest discretion they think wise, it was said, that, where a building insured is wholly destroyed, it ordinarily would be a wise exercise of discretion for the referees to determine the amount of the loss after a hearing conducted in the usual way in which civil cases are tried. *Ibid.*

In an action on a policy of fire insurance in the Massachusetts standard form, where the defense relied upon was that the award of the referees determining the amount of loss was invalid, and where the trial took place more than two years after the fire so that, if the present action could not be maintained, no new action could be brought within the limit of time fixed by the policy, it was said, in deciding that the award was valid, that, if the award had been invalid, it would not follow necessarily that judgment should be entered for the defendant. *Ibid.*

No opinion was expressed on the question, whether the provision in the standard form of fire insurance policy that "such reference unless waived by the parties shall be a condition precedent to any right of action" makes the condition precedent the reference only or whether an award completing the reference is also a part of the condition. *Ibid.*

Accident.

In a policy insuring against bodily injuries effected "through external, violent and accidental means," not covering suicide "whether sane or insane," the

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phrase "accidental means" was held to have been used in its ordinary sense to denote a casualty happening unexpectedly without intention or design. *Bohaker* v. *Travelers Ins. Co.* 32.

In the same case it was held that, although the burden might be upon the plaintiff to prove that the death of the insured was not due to suicide, yet, in the absence of evidence of suicide, this burden may be found to have been sustained by the presumption of fact against self-destruction. *Ibid.*

In an action upon a policy of accident insurance, to recover for the alleged accidental death of the insured, who, when delirious by reason of severe typhoid fever, escaped through a window and fell thirty feet, receiving injuries, it was held that on the evidence the immediate cause of the injuries was the fall, which was external and violent within the meaning of the policy, and which also could have been found to have been accidental. *Ibid.*

In the same case it also was held that it could not be ruled as matter of law that the injuries were not "effected directly and independently of all other causes" through accidental means, as the typhoid fever from which the insured was suffering could have been found to have been simply a condition and not a moving cause of his injuries. *Ibid.*

In an action of tort for personal injuries the defendant should not be allowed to show in reduction of damages that the plaintiff received money under a policy of accident insurance by reason of his injuries, the transactions between an insurance company and the plaintiff having no bearing on the extent of his injuries nor upon the defendant's liability for them. *Gray* v. *Boston Elevated Railway*, 143.

Authority of Agent.

Evidence, which was held not to warrant a finding that the agent in this Commonwealth of an insurance company incorporated in another State had authority, without instructions from the home office, to waive a provision of a policy providing that no legal proceedings should be commenced under the policy until after three months from the filing of a proof of loss. *Thomson* v. *American Fidelity Co.* 460.

INTEREST.

Where, in an action on a probate bond, judgment is entered for the penal sum of the bond with interest thereon, if the amount for which execution properly should issue exceeds such penal sum, the allowance of interest is correct as compensation for the wrongful detention of the money. *Harmon* v. *Weston*, 242.

And, even if the amount for which execution is to issue does not exceed such penal sum, it cannot be said that the defendant is harmed by the allowance of interest in the entry of judgment, for he can be held only for the amount for which execution is to issue. *Ibid.*

INTERSTATE COMMERCE.

Where the consignee of goods sent by rail receives them under a bill of lading, one of the terms of which is that the consignee shall pay the freight at the rate stated, and no special rate is stated, but the bill of lading contains a

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printed provision that the "property will be carried at tariff rates," receipt and acceptance of the goods under the bill of lading is evidence of an implied promise by the consignee to pay the freight charges established under the interstate commerce act. *New York, New Haven, & Hartford Railroad* v. *York & Whitney Co.* 36.

In an action by a railroad corporation against the consignee of goods, who received them from the plaintiff under a bill of lading by which he agreed to pay the freight rates established under the interstate commerce act, to recover a balance of the freight charges, which had not been claimed at the time of the delivery of the goods by reason of an erroneous classification that was not discovered until several months later, the defense of estoppel was held not to be open. *Ibid.*

It also was held that the defendant could not be allowed to reduce the damages by showing in recoupment the effect of the payment of and the receipt given for the wrong rate. *Ibid.*

St. 1902, c. 115, providing that a barrel of sweet potatoes shall contain one hundred and fifty pounds, is not a regulation of interstate commerce, and is constitutional. *Commonwealth* v. *Guseman*, 349.

St. 1907, c. 394, as amended by St. 1911, c. 163, providing that whoever gives or attempts to give false or insufficient measure shall be punished as there stated, is constitutional, and is not unconstitutional as applied to a sale by insufficient measure of a barrel of sweet potatoes in the original package in which they were brought from another State. *Ibid.*

JOINT TORTFEASORS.

A single action of tort cannot be maintained against two defendants unless they directly or indirectly co-operated in doing the alleged wrong; and a declaration with two counts, each alleging a separate tort committed by a different defendant, with no allegation of conspiracy or concert between them, will be held bad, on demurrer, for misjoinder of defendants. *Dickey* v. *Willis*, 292.

In an action of tort for a wrongful act alleged to have been committed by joint defendants, an allegation of conspiracy does not change the nature of the wrong alleged, but is simply a way of alleging joint action by the defendants. *Perry* v. *Hayes*, 296.

JUDGMENT.

Where an owner in common of certain land, in partition proceedings in the Probate Court instituted by him, makes no claim before the commissioners to the effect that a barn on the land belongs to him, and with his assent a decree is made setting off the land and barn to another, he is estopped thereafter to claim the barn as personal property belonging to him. *Cutter* v. *Cutter*, 24.

A judgment for the plaintiff in an action of summary process for possession of certain land, entered after a full trial of the question, whether the plaintiff and his predecessors in title had notice of a lease of the premises for more than seven years, given by a former owner to the defendant before the plaintiff's predecessor received title, but not recorded, was held to be *res judicata*

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barring the maintenance of a suit in equity to establish and protect the lessee's right to possession, begun before the action of summary process was begun and continued under an amended bill after the judgment in that action. *Edwards* v. *Columbia Amusement Co.* 125.

It also was held that the bill in equity as amended was not an "action . . . brought . . . to recover the lands or tenements in question," to which by R. L. c. 181, § 9, the judgment in the action of summary process would not be a bar, because the plaintiff did not seek therein to settle the title to the land, but only the right to present possession. *Ibid.*

An action of tort against three persons for an alleged wrongful removal of the plaintiff from the offices of director and treasurer of a certain corporation was barred as to two of the defendants by a decree of the Supreme Judicial Court dismissing a bill in equity by the plaintiff against those defendants, and was barred as to the third defendant by a final decree of the Supreme Court of Nova Scotia. *Perry* v. *Davis*, 296.

See also EQUITY JURISDICTION, *Res judicata.*

JURISDICTION.

An action brought in a State court is not one "arising under the Constitution or laws of the United States," so that the defendant would be entitled as a matter of law to have it removed to a United States court, unless it appears to be such from the plaintiff's statement of his cause of action in his writ, declaration, petition or other pleading. *Long* v. *Quinn Brothers*, 85.

The objection, that a provision in a building contract, which makes the issuing of the final certificate by the architect conclusive as to the performance of the contract, is void as an attempt to oust the courts of their jurisdiction, is not open after the decision of the architect has been made and the parties have been notified of it without previous objection from either of them. *Hathaway* v. *Stone*, 212.

By the provisions of R. L. c. 170, § 1, a foreign corporation, like a natural person not an inhabitant of this Commonwealth, cannot be sued in this Commonwealth unless it has been served with process within the Commonwealth or unless an effectual attachment of its property within the Commonwealth has been made upon the original writ. And, where there has been no such service or attachment, jurisdiction cannot be acquired by a subsequent attachment made by supplementary process under R. L. c. 167, § 80. *Roberts* v. *Anheuser Busch Brewing Association*, 341.

EQUITY JURISDICTION, see that title.

Jurisdiction of the Land Court, see LAND COURT, *Jurisdiction.*

Jurisdiction of the Probate Court, see PROBATE COURT.

Jurisdiction and power of the Superior Court, see SUPERIOR COURT.

JURY AND JURORS.

Constitutional right to a trial by jury in a suit to reach and apply equitable assets in satisfaction of a debt. *Stockbridge* v. *Mixer*, 415.

Time when a claim of such a jury trial should be filed is governed by Equity Rule 36, and, where a replication is filed, is within ten days of such filing. *Ibid.*

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The provision of St. 1909, c. 236, § 1, that, in a case before this court on an exception by a defendant to a refusal of a presiding judge to order a verdict for such defendant, this court, if the defendant's exception is sustained, may by rescript direct the entry in the trial court of judgment for the defendant, does not violate the right to a trial by jury which is guaranteed by art. 15 of the Declaration of Rights. *Bothwell* v. *Boston Elevated Railway*, 467.

Where, at the time of the trial of an action against a corporation operating a street railway for personal injuries sustained when the plaintiff was alighting as a passenger from a car of the defendant, it appeared that one of the jury, more than six years before the trial, was injured in a collision with a car of the defendant and presented a claim for damages to the defendant, that no settlement of the claim was made and no action was brought, these facts were held under the circumstances not to be ground for disqualification of the juror as matter of law or for disturbing action of the trial judge in denying a motion of the defendant for a new trial. *Gray* v. *Boston Elevated Railway*, 143.

Where a declaration of a deceased person is offered in evidence under R. L. c. 175, § 66, the presiding judge, while conducting a preliminary examination for the purpose of determining whether the declaration offered was made by the declarant under the conditions required by the statute, may direct that the jury be retired out of hearing. *Slotofski* v. *Boston Elevated Railway*, 318.

LACHES.

See that subtitle under EQUITY JURISDICTION.

LAND COURT.

Jurisdiction.

Land Court has jurisdiction of the action, described in R. L. c. 178, § 47, to recover possession of land upon which a levy of execution has been made as fraudulently standing in the name of a person other than the judgment creditor. *Browne* v. *Browne*, 76.

Section 1 of St. 1911, c. 433, gives to the Superior Court power to order transferred to the Land Court a writ of entry wrongly begun in the Superior Court in 1909, in which the tenant has appeared, answered and claimed a trial by jury; and such statute is constitutional. *Ibid.*

Jury Issues.

The provisions of St. 1910, c. 560, relating to the framing of issues for a jury in cases entered in the Land Court and the transfer of the cases to the Superior Court for trial by a jury before any trial in the Land Court do not apply to a writ of entry wrongly entered in the Superior Court in 1909 and under St. 1911, c. 433, § 1, transferred to the Land Court on November 9, 1911. *Browne* v. *Browne*, 76.

Such a case is governed by the procedure prescribed by St. 1904, c. 448, and, in order to have a trial by jury of a question of fact, a party, within thirty days after a hearing and a decision adverse to him in the Land Court, must file in the Land Court an appeal to the Superior Court and have jury issues for the trial in the Superior Court framed in the Land Court. *Ibid.*

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Where, after a trial by jury in the Superior Court of issues framed in the Land Court, the proceedings in the Superior Court have come to an end and a certificate has been sent from the clerk of the Superior Court to the Land Court under R. L. c. 128, § 14, an appeal to this court will lie under St. 1904, c. 448, § 8, (St. 1910, c. 560, § 6,) from an order of the Superior Court allowing a motion to amend one of the issues framed in the Land Court. *Weld* v. *Clarke*, 324.

Where in a writ of entry brought in the Land Court, one of the issues framed for trial in the Superior Court is to determine the amount of rents and profits for which the tenant is liable, and, although the tenant seasonably has made a claim for improvements, the form of the issue does not make it plain that the tenant is entitled to a set-off for improvements against rents and profits, as provided in R. L. c. 179, §§ 17–27, the judge of the Superior Court before whom the issues are tried properly may allow an amendment of the issue to make plain the right of the tenant to a set-off for improvements. *Ibid.*

Appeal.

The mere filing in the Land Court, within thirty days after a decision of the judge of that court, of a motion for jury issues to be tried in the Superior Court, does not amount to a claim of appeal under St. 1904, c. 448, § 8. *Browne* v. *Browne*, 76.

Where, after a trial by jury in the Superior Court of issues framed in the Land Court, the proceedings in the Superior Court have come to an end and a certificate has been sent from the clerk of the Superior Court to the Land Court under R. L. c. 128, § 14, an appeal to this court will lie under St. 1904, c. 448, § 8, (St. 1910, c. 560, § 6,) from an order of the Superior Court allowing a motion to amend one of the issues framed in the Land Court. *Weld* v. *Clarke*, 324.

LANDLORD AND TENANT.

Fixtures.

Evidence, at the trial before a judge without a jury of an action of tort against the owner of a building for the alleged conversion of a ventilator and pipe attached thereto, upon which it was held that the judge could not be required as a matter of law to find and rule that the ventilator and pipe were personal property, and which warranted a finding for the defendant. *Natural Autoforce Ventilator Co.* v. *Winslow*, 462.

Liability for Personal Injuries.

The owner of a building in the city of Boston, to which St. 1892, c. 419, § 66, applied and which was occupied by a tenant to whom it was leased by an unrecorded lease for twenty years, was held by reason of certain provisions in the lease not to be liable to a person injured from slipping on ice on the adjoining sidewalk formed by water discharged from a spout attached to the building. *Cerchione* v. *Hunnewell*, 588.

The owner of a building, which is constructed without any provision for artificial light, who has let it to a tenant under a lease giving the tenant control of the halls and stairways and providing that repairs shall be made by the

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tenant, is not liable to a subtenant, or to one coming by rightful invitation to a room hired by such subtenant, for personal injuries from falling down a staircase by reason of the darkness of a hallway in the building. *Stone* v. *Lewis*, 594.

Effect of Death of Lessee.

On the death of a lessee, the leasehold interest was held to pass to the administrator of his estate. *Johnson* v. *Stone*, 219.

Obligation to pay Rent.

Evidence is not admissible, at the trial of an action for rent due under a lease in writing, to show that the tenant agreed to a higher rent than that first proposed, in consideration of the landlord's orally agreeing to build a veranda, which he afterwards refused to build. *Spear* v. *Hardon*, 89.

In an action against an administrator on a covenant to pay rent contained in a lease from the plaintiff to the defendant's intestate, it is no defense that before the rent accrued the defendant obtained a responsible person ready to accept an assignment of the lease whom the plaintiff refused to accept as a tenant, the obligation to pay rent being terminable only by a surrender of the lease accepted by the lessor. *Johnson* v. *Stone*, 219.

Action of Summary Process for Possession.

A judgment for the plaintiff in an action of summary process for possession of certain land, entered after a full trial of the question, whether the plaintiff and his predecessors in title had notice of a lease of the premises for more than seven years, given by a former owner to the defendant before the plaintiff's predecessor received title, but not recorded, was held to be *res judicata* barring the maintenance of a suit in equity to establish and protect the lessee's rights to possession, begun before the action of summary process was begun, and continued under an amended bill after the judgment in that action. *Edwards* v. *Columbia Amusement Co.* 125.

It also was held that the bill in equity as amended was not an "action . . . brought . . . to recover the lands or tenements in question," to which by R. L. c. 181, § 9, the judgment in the action of summary process would not be a bar, because the plaintiff did not seek therein to settle the title to the land, but only the right to present possession. *Ibid.*

Lease of Chattel.

Under a lease of a chattel for a stipulated rent of a certain sum of money a month payable in advance, the lessor can bring an action for each unpaid monthly instalment of rent as it falls due, and if, after he has brought an action for the rent due up to the date of the writ and before such action has come to trial, he brings a suit of equitable replevin in which he claims rent that fell due after the previous action was brought and obtains a decree ordering the defendant to deliver the chattel to him and to pay him the rent claimed in that suit, the decree is no bar to the first action brought for the rent previously due. *Electrelle Co.* v. *Maguire*, 550.

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LEASE OF CHATTEL.

See that subtitle under LANDLORD AND TENANT.

LEGACY.

See DEVISE AND LEGACY.

LIBEL AND SLANDER.

Pleadings.

Upon a demurrer to the declaration in an action of tort for libel, where the publication alleged is libellous without proof of special damage, the question whether the declaration contains a sufficient allegation that the plaintiff suffered special damage cannot be raised unless it is assigned as a cause of demurrer. *Robinson* v. *Coulter*, 566.

Upon a demurrer to the declaration in an action by a building contractor, who had a contract to build a schoolhouse for a town, against the proprietor of a newspaper for the publication of an alleged libel charging the plaintiff with a dishonest failure to comply with the requirements of his contract, where the declaration contains an averment that the words were published maliciously, it is not open to the defendant to contend that the statements were true or that they were privileged as a fair and reasonable comment and criticism on a matter of public interest, these being matters of defense which can be availed of only when they are set up in an answer, and which, even if they were open, would constitute no defense because the allegation of malice is admitted by the demurrer. *Ibid.*

What is actionable.

The publication of a defamatory statement in writing, which imputes to a building contractor a dishonest failure to comply with the requirements of a contract to erect a schoolhouse for a town, is an actionable libel, and, being in disparagement of the contractor's character and not merely of his work, no proof of special damage is required to maintain the action. *Robinson* v. *Coulter*, 566.

In an action by a building contractor, who had a contract to build a schoolhouse for a town, against the proprietor of a newspaper for the publication of an alleged libel charging the contractor for the building of the schoolhouse, not mentioning the plaintiff by name, with a dishonest failure to comply with the requirements of his contract, it is a question of fact for the jury whether the article was published of and concerning the plaintiff. *Ibid.*

Privileged Communications.

In order that a report in a newspaper of an indictment found by a grand jury should constitute a privileged communication, for which the publisher cannot be held liable in an action of tort for libel, such report not only must be fair and impartial but also must be accurate. *Sweet* v. *Post Publishing Co.* 450.

In an action of tort, by an attorney at law against the publisher of a newspaper,

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for an alleged libel in publishing an article naming the plaintiff as one of several persons indicted and arrested for conspiracy to defraud and identifying him by description, it is no defense that the defendant by an honest mistake referred to and described the plaintiff instead of another person of a similar name, that the defendant exercised reasonable care and diligence in trying to ascertain the facts before publishing the report and that the mistake occurred in spite of such care and diligence. *Sweet* v. *Post Publishing Co.* 450.

Whether evidence of such care and diligence would be admissible in mitigation of damages was not considered. *Ibid.*

Plaintiff's good Character.

In an action for libel brought by the chairman of the licensing board of a city against the publisher of a newspaper, alleging libellous statements that the plaintiff and his associates on the board had failed to enforce the law relating to sales of intoxicating liquors, evidence of the plaintiff's reputation for good character was held to have been excluded properly upon the issue of liability because the language used by the defendant did not impute any act punishable criminally. *Stearns* v. *Long*, 152.

In the same case, it was said that it was an open question whether in this Commonwealth, where the defendant in an action for libel under a plea of justification asserts and undertakes to prove that the plaintiff was guilty of acts punishable as crimes, the plaintiff may rebut such proof by evidence of good character and reputation. *Ibid.*

Truth as a Defense.

Action of the Superior Court, reversing, on a review under R. L. c. 100, § 4, of a decision by the mayor of a city removing the members of the licensing board, and finding that the chairman was not guilty of any violation of law, will not prevent a report in writing, made to the board by police officers and stating violations of the law by various innkeepers, from being introduced in evidence in behalf of the defendant in an action of libel against the proprietor of a newspaper for the publication of statements of laxity of the board, such report tending to show the truth of the statements contained in the alleged libel. *Stearns* v. *Long*, 152.

Damages.

Proper measure of damages in an action against the publisher of a newspaper by an attorney at law for an alleged libel in publishing an article falsely stating that the attorney had been indicted and arrested for a crime. *Sweet* v. *Post Publishing Co.* 450.

LIEN.

Under R. L. c. 6, § 77.

Liens against funds retained by the Commonwealth under a contract for the construction of a State highway cannot be established as for labor or materials "used in such construction" within the meaning of R. L. c. 6, § 77,

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upon claims for boards used for concrete forms and for conduits, upon claims for netting, cotton line, or for use of rules, road scraper or scales, for buggies used in transporting help, for money paid for freight, or for coal for the steam roller; nor can such a lien be established upon a claim for hauling stone from various stone walls in the vicinity of the highway to the crusher and for hauling cracked stone from the crusher to the road. *Thomas* v. *Commonwealth*, 369.

Mechanic's Lien.

See that title.

LIMITATIONS, STATUTE OF.

The statute of limitations being a matter of remedy, the question whether an action is barred by it is to be determined by the law of the forum. *Clarke* v. *Pierce*, 552.

A promissory note under seal, although the seal is unnecessary for its validity, is a contract under seal within the meaning of the provision of the statute of limitations contained in R. L. c. 202, § 1, and an action can be brought on it at any time within twenty years after the cause of action accrues. *Ibid.*

The defendant in an action of contract may withdraw a plea of the statute of limitations. *Moore* v. *Stuart*, 456.

Question, whether the defendant by his testimony withdrew such a plea, is for the court. *Ibid.*

Proper way for the plaintiff to raise the question. *Ibid.*

Exceptions to the refusal of a judge to give to the jury certain instructions on the question, whether by his testimony a defendant had withdrawn a plea of the statute of limitations, which were overruled because the jury's finding on that question was a nullity which could not affect the plaintiff's rights. *Ibid.*

Whether the time within which an action upon a certificate of deposit (using that term in its proper sense) should be brought against the bank which issued it is twenty years, as prescribed by R. L. c. 202, § 1, cl. 2, or six years, as prescribed by § 2, was not decided. *Pierce* v. *State National Bank*, 18.

In a suit in equity by a foreign corporation under R. L. c. 141, §§ 26, 27, against the devisees and legatees under the will of a deceased subscriber for shares of stock of the plaintiff, for the collection of a call of £1 a share, it appeared that the call had not been made until after the settlement of the estate of the deceased subscriber and after the expiration of the two year period of limitation, and that, before the expiration of such period, the necessity for and probability of a call upon the actual subscribers must have been apparent to the plaintiff's directors, and it was held that the suit could not be maintained because under R. L. c. 141, § 13, the plaintiff's claim could legally have been presented to the Probate Court before the estate was fully administered as one that might become justly due from the estate. *Electric Welding Co.* v. *Fitz*, 315.

In a suit in equity by a member of a partnership, which had been composed of three persons, against the widow of one of the three partners, personally and as the executrix of his will under which she was the sole legatee and devisee, alleging that upon an accounting, by reason of a mutual mistake of fact made by all the parties through their common agent, the defendant

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received much more than her share of the partnership assets, and seeking to recover such excess from her personally, R. L. c. 141, § 9, limiting actions against an executor or administrator, is no defense. *Bowker* v. *Torrey*, 547.

One who, after having acted as an agent in charge of real estate of a certain person, continues in charge of it for such person's heirs, and whose claim for services against the ancestor has become barred by the statute of limitations, has no right to deduct the amount of the claim so barred from rents collected from the real estate which have come into his possession while acting as agent for the heirs. *Stevens* v. *Baker*, 30.

LORD'S DAY.

In an action of contract, the defense, that the contract was invalid because it was made on the Lord's day, cannot be availed of if it is not set up in the answer. *Raymond* v. *Phipps*, 559.

MALICIOUS PROSECUTION.

The Superior Court has no power, after the commencement by trustee process of an action of tort for conversion and malicious use of civil process, to allow amendments changing the writ to one of summons and attachment and adding to the declaration a count for malicious prosecution. *Guarino* v. *Russo*, 83.

In an action for malicious prosecution, there was evidence tending to show, that on complaint of the defendant to the chief of police of a town, a warrant to search the house of the plaintiff's brother for geese of the defendant was procured, the geese were found and the plaintiff was arrested and two days later a complaint charging larceny was made against the plaintiff by the chief of police; and on that and other evidence it was held that the jury were warranted in finding that the defendant caused the charge to be made against the plaintiff without probable cause to believe him guilty and with no sincere belief in his guilt, and that it could not be ruled as a matter of law that there was no evidence upon which the plaintiff might recover. *Jones* v. *Schein*, 586.

MANDAMUS.

The granting of a writ of mandamus is not a matter of right but of sound judicial discretion. *Smith* v. *Commissioner of Public Works*, 353.

Application for a writ of mandamus directing the commissioner of public works of Boston to expend a large sum of money for the purchase of gas lamps, which was held properly to have been denied in the exercise of the sound discretion of the court. *Ibid.*

Writ of mandamus was issued to compel the mayor of a city other than Boston, which has accepted provisions of St. 1909, c. 188, to issue a warrant for the payment of a pension to a superintendent of police who had been pensioned and retired under the provisions of that act, although he had not kept the mayor informed of his whereabouts during absence from the city. *Moffatt* v. *Mayor of Lowell*, 92.

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MARRIED WOMAN.

See HUSBAND AND WIFE.

MASTER AND SERVANT.

See AGENCY; NEGLIGENCE, *Employer's Liability;* WORKMEN'S COMPENSATION ACT.

MECHANIC'S LIEN.

In order that a statement of a mechanic's lien claimed by a partnership may comply with the requirements of R. L. c. 197, § 6, that a statement of a lien shall be filed by "the person claiming it" and shall be "signed and sworn to by him or a person in his behalf," it is sufficient if it is signed in the name of the firm by one of the partners and is sworn to by that partner. *Lays* v. *Hurley*, 582.

Case in which there was evidence warranting a finding that acts of one partner, in signing and swearing to a statement in the name of a partnership composed of two brothers, were authorized and ratified by the other partner. *Ibid.*

MISTAKE.

Suit in equity to relieve from the results of a mistake, see EQUITY JURISDICTION, *To relieve from Results of Mistake.*

MORTGAGE.

Of Real Estate.

At a sale in foreclosure of a mortgage of real estate "subject to interest," it was held that the purchaser bought the property with an agreement on his part to pay the interest then due on the mortgage, so that the mortgagee, in accounting with the mortgagor or his successor in title for the proceeds of the sale, was not entitled to be credited with the amount due as interest on the mortgage at the time of the sale. *Crane* v. *White*, 478.

Notes secured by mortgages of land in another State, which on the first day of April of a certain year are in the possession of an ancillary administrator appointed in such other State to administer the estate in that State of a testator whose domicil was in this Commonwealth and whose will was proved here, lawfully cannot be assessed for taxation to the executor of the will in this Commonwealth. *Gray* v. *Lenox*, 598.

Of Personal Property.

Rights of a mortgagee of personal property under an unrecorded instrument of transfer absolute in form, which was executed and delivered in good faith more than four months before the filing by the mortgagor of a voluntary petition in bankruptcy, upon his taking possession of the mortgaged property less than one month before the filing of such a petition when he

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has reasonable cause to believe that the mortgagor is insolvent. *Coggan* v. *Ward*, 13.

Before the enactment of St. 1913, c. 656, a mortgage of personal property, made by a bill of sale absolute in form but intended as security, was not required by R. L. c. 198, § 1, to be recorded, and consequently was not included in the provision of the bankruptcy act as amended by U. S. St. c. 487, § 13, that the period within which a transfer may constitute a preference "shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required." *Ibid.*

The requirement of R. L. c. 198, § 1, that a mortgage of personal property must be recorded within fifteen days "from the date written in the mortgage" in order to be enforceable against a person other than the parties thereto unless the mortgaged property is delivered to and retained by the mortgagee, was held to have been satisfied as to a certain mortgage indenture between a street railway company and a trust company, which was recorded within fifteen days after the date stated in the attesting clause as that of its execution and acknowledgment. *Old Colony Trust Co.* v. *Medfield & Medway Street Railway*, 156.

Mortgage to Trustees for Bondholders.

Bill in equity by a holder of bonds of a mining corporation, against the directors of the corporation, the corporation and trustees holding the corporation property in mortgage to secure the bondholders' rights, for an accounting as to funds which the plaintiff alleges should be paid to the trustees because of waste and strip committed by persons to whom the corporation had let its property. *Young* v. *Haviland*, 120.

The claims of holders of bonds of a street railway company, secured by a mortgage to a trust company, were held rightly to have been given priority, by a receiver appointed in a suit in equity to foreclose the mortgage, over a claim of a second street railway company for an agreed compensation for power, payments of which were two years in arrears, it not appearing that the delay in instituting the foreclosure proceedings was for the purpose of benefiting the mortgagee by the claimant's expenditures. *Old Colony Trust Co.* v. *Medfield & Medway Street Railway*, 156.

MUNICIPAL CORPORATIONS.

Officers and Agents.

The treasurer of a town has no authority to indorse a check payable to the order of the town except for the purpose of depositing it for collection to the credit of the town. *Franklin Savings Bank* v. *International Trust Co.* 231.

Writ of mandamus was issued to compel the mayor of a city other than Boston, which has accepted the provisions of St. 1909, c. 188, to issue a warrant for the payment of a pension to a superintendent of police who had been pensioned and retired under the provisions of that act, although he had not kept the mayor informed of his whereabouts during absence from the city. *Moffatt* v. *Mayor of Lowell*, 92.

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The commissioner of public works of the city of Boston is not required by the charter of that city to expend a large sum of money for the purchase of gas lamps and other apparatus for street illumination merely because the money has been appropriated for that purpose by the city council. *Smith* v. *Commissioner of Public Works*, 353.

Writ of mandamus to compel such commissioner to spend the money for the purpose designated properly may be refused if it appears that the commissioner believes on apparently substantial grounds that such an expenditure would be unwise for the city. *Ibid.*

By-laws and Ordinances.

The enactment of an ordinance by a city under authority of R. L. c. 104, § 1, providing that "no building shall be erected for or converted to use as a garage unless such use is previously authorized by the board of aldermen," is a valid exercise of the police power which does not exceed the scope of the statute. *Storer* v. *Downey*, 273.

Veto by Mayor.

Under St. 1907, c. 565, § 3, the mayor of Cambridge, in returning without his approval an order of the board of aldermen granting authority to erect a garage in that city, complies with that statute if he states objections in writing founded on considerations of municipal policy other than "the prevention of fire and the preservation of life," which are named in R. L. c. 104, § 1. *Storer* v. *Downey*, 273.

MUNICIPAL COURT OF THE CITY OF BOSTON.

Appellate Division.

Under St. 1912, c. 649, § 8, and Rule E of the Municipal Court of the City of Boston, no appeal lies to this court from a decision of the Appellate Division of the Municipal Court of the City of Boston upon a petition for the establishing of exceptions taken to rulings of the judge presiding at a trial in that court. *Cohen* v. *Berkowitz*, 68.

If the Appellate Division of the Municipal Court of the City of Boston, in dealing under St. 1912, c. 649, § 8, with a report of exceptions taken at a trial before a single judge of that court, decides that there was no prejudicial error in the rulings complained of, the order should be, "report dismissed." In this case an order made in the form, "Judgment for the defendant upon the finding ordered," while informal, was held to be in substance a dismissal of the report. *Ibid.*

On an appeal to this court from a decision of the Appellate Division of the Municipal Court of the City of Boston under St. 1912, c. 649, §§ 8, 9, the decision appealed from should be set forth in the form in which it was entered. *Spear* v. *Hardon*, 89.

And, on such an appeal, if there was an opinion stating the reasons for the decision, this should not be printed, not being a part of the record. *Cohen* v. *Berkowitz*, 68; *Spear* v. *Hardon*, 89.

Where, on such an appeal, no question of practice is raised, only the report to the Appellate Division, the decision thereon and the appeal to this court,

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with the dates of filing and an attestation by the clerk, need be printed. When a question of practice is raised, enough of the record of the Municipal Court should be printed to show clearly the point presented. *Spear* v. *Hardon*, 89.

The record in this court on an appeal from a decision of the Appellate Division of the Municipal Court of the City of Boston under St. 1912, c. 649, § 8, should show the dates of the filing of all papers material to the record. *Cohen* v. *Berkowitz*, 68.

NEGLIGENCE.

Due Care of Plaintiff.

Of a driver walking on the down hill side of a loaded wagon which tipped over upon him. *Simonds* v. *Interstate Lumber Co.* 263.

Of a sawyer in a mill in using a board railing beside a passageway. *Perry* v. *Davis & Sargent Lumber Co.* 338.

Of a girl seventeen years of age whose hand was caught between the rollers of an irregularly running steam mangle in a laundry. *Oswald* v. *Donohue*, 574.

Of a boy attempting to cross a street in front of an electric street car and confused by the ringing of the gong. *Giaccobe* v. *Boston Elevated Railway*, 224.

Of a boy six years and eight months of age, who ran in front of a street car while he was playing tag. *Godfrey* v. *Boston Elevated Railway*, 432.

Of a young girl who, while crossing a street in a diagonal direction and not at a cross walk, was struck by a street railway car. *Sheehan* v. *Boston & Northern Street Railway*, 463.

Of a boy ten years of age on a bicycle without a brake, who collided with a street car at the foot of a steep hill. *Bosquet* v. *Worcester Consolidated Street Railway*, 538.

Of a nurse who relied on an assurance by the wife of a patient that a light would be kept burning in a hallway, and fell down a stairway when the light was not burning. *McLeod* v. *Rawson*, 257.

Due Care of Plaintiff's Decedent.

In order to recover, in an action under St. 1907, c. 392, against a street railway company for the death of a person, not a passenger, it is necessary for the plaintiff to prove that the decedent was giving reasonably intelligent and energetic attention to his own safety when he was injured, and it is not enough to show a negative and passive freedom from fault on his part. *Bothwell* v. *Boston Elevated Railway*, 467.

Lack of due care of a boy five years and eleven months of age running across a reserved space in the middle of a street in front of a street car. *Kyle* v. *Boston Elevated Railway*, 260.

Lack of due care on the part of a girl seven years of age in running across a street railway track in front of a plainly visible and rapidly approaching car. *Walukewich* v. *Boston & Northern Street Railway*, 262.

Of a boy who, fearing pursuit by a Chinaman whom he had been annoying, ran into a street in front of a street railway car and was killed. *Bothwell* v. *Boston Elevated Railway*, 467.

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Of an experienced teamster driving across street car tracks from an intersecting street and seeing an approaching car. *Scanlon* v. *Berkshire Street Railway*, 554.

Of a brakeman standing on the ladder on the side of a box freight car while he was uncoupling it, and crushed between it and a car left too close to the track. *Parmelee* v. *New York Central & Hudson River Railroad*, 294.

Of a Child.

If a boy, five years and eleven months old, who has been playing in a park with three or four other boys somewhat older than himself, starts with the other boys to run across a reserved space in the middle of the street in front of a street railway car which is approaching rapidly, and, following the other boys, gets only half way across the track when he is struck by the car, he is negligent as matter of law. *Kyle* v. *Boston Elevated Railway*, 260.

If a girl seven years of age, whether following playmates or not, starts to run across a street railway track in front of a plainly visible and rapidly approaching car, which is so near that she barely has got upon the track when the car strikes her, she is negligent as matter of law, there being nothing to show that she was in the exercise of any care at all. *Walukewich* v. *Boston & Northern Street Railway*, 262.

A boy six years and eight months of age, who is playing tag with two other boys on a city street with parallel street railway tracks, on which he knows that cars are passing frequently at all times of day, and, being absorbed wholly in his play, runs in front of an approaching street railway car which is so near that it strikes him with hardly an appreciable interval of time as soon as he reaches the track, is not in the exercise of any care at all, and consequently cannot recover for his injuries thus caused, assuming that the motorman was negligent. *Godfrey* v. *Boston Elevated Railway*, 432.

Trespasser.

In an action for damages resulting from a collision in Vermont of an unregistered automobile of the plaintiff with an automobile of the defendant, it was held that the common law of Vermont relating to a violation of a statute requiring the registration of automobiles must be presumed to be the same as that of this Commonwealth, so that the plaintiff was a trespasser upon the highway when the collision took place, and that the defendant had violated no duty to him. *Holden* v. *McGillicuddy*, 563.

Employer's Liability.

Assumption of risk by employee.

In an action for personal injuries sustained by the plaintiff in the employ of the defendant, the defense that the plaintiff assumed the risk of the injury is not open to the defendant unless it is set up in the answer, and, when it is so set up, the burden is on the defendant to prove it. *Oswald* v. *Donohue*, 574.

In an action for personal injuries sustained by the plaintiff in the employ of the defendant, where the defendant sets up and relies upon the defense that the plaintiff assumed the risk of the injury, if it appears that the danger

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came into existence after the contract of employment was made, the question of assumption of risk usually is one of fact for the jury. *Oswald* v. *Donohue*, 574.

Application of the foregoing rules of law in an action by a girl seventeen years of age for injuries due to her hand having been caught in a steam mangle in a laundry. *Ibid.*

An employee in a lumber mill does not assume as a part of his contract of employment the risk of injury from the giving way of a board nailed to two posts at the side of a passageway in the mill adjoining an open cellar, if the open cellar was constructed and the board was nailed to the posts after his employment had begun. *Perry* v. *Davis & Sargent Lumber Co.* 338.

In the same case it was held that, on the evidence, the question, whether the plaintiff had assumed the risk of the injury was a question of fact for the jury. *Ibid.*

Fellow servant.

If a workman, who, while employed in removing a hill or bank of sand and gravel, by reason of assurance of his safety negligently communicated to him by his superintendent continues to work on a slope and, when an overhang breaks off, receives injuries which cause his death after conscious suffering, the employer is not liable at common law to the administrator of the estate of the workman for the suffering caused by his injuries, because at common law the superintendent was a fellow servant of the injured workman. *Polvere* v. *Hugh Nawn Contracting Co.* 199.

Dangerous and defective machinery and appliances.

A girl seventeen years of age, who is set at work upon a steam mangle in a laundry when wholly without experience in working on such a machine, is not negligent as matter of law in continuing to work when she sees that the mangle is running somewhat irregularly, especially when she is working in the presence and under the direction of a person who has been entrusted with the duty of instructing her and is doing her work in the way she has been shown. *Oswald* v. *Donohue*, 574.

In an action against the proprietor of a laundry, for personal injuries sustained by the plaintiff, a girl seventeen years of age, from her hand being caught between the rollers of a steam mangle, where it appears that the plaintiff never before had worked on a mangle and was injured when she had been working on this machine only an hour and a half and that the machine was out of order, it is for the jury to say on the evidence whether the plaintiff fully comprehended the danger to which she was exposed and voluntarily assumed the risk of an injury due to the machine running irregularly. *Ibid.*

In an action by an experienced teamster against a lumber company by which he was employed, for personal injuries caused by the tipping over upon the plaintiff of a loaded lumber wagon when it was being driven into a field to unload the lumber, it was held that there was evidence tending to show that, due to defects, the wagon was less stable than it should have been, and that it was a question for the jury to determine, whether the accident was due to a defective wagon provided by the defendant. *Simonds* v. *Interstate Lumber Co.* 263.

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It also was held that the question, whether the driver was in the exercise of due care in walking on the downhill side of the wagon, was for the jury. *Simonds* v. *Interstate Lumber Co.* 263.

Dangerous place in which to work.

If a workman, who, while employed in removing a hill or bank of sand and gravel, by reason of assurance of his safety negligently communicated to him by his superintendent, continues to work on a slope and, when an overhang breaks off, receives injuries which cause his death after conscious suffering, the employer is not liable at common law to the administrator of the estate of the workman for the suffering caused by his injuries, because at common law the superintendent was a fellow servant of the injured workman. *Polvere* v. *Hugh Nawn Contracting Co.* 199.

But, in an action under the employers' liability act for causing the death of the workman, there was held to be evidence that the death was caused by the negligence of a superintendent of the defendant. *Ibid.*

In an action by a sawyer in a lumber mill against his employer for personal injuries sustained from the giving way of a board nailed to two posts by the side of a passageway in the mill adjoining an open cellar, into which the plaintiff fell, the question of the defendant's liability turned on whether the board was merely a warning to indicate the place where the floor ended and the cellar began or was a railing intended to afford some degree of support, and it was held that the question of the defendant's negligence was for the jury. *Perry* v. *Davis & Sargent Lumber Co.* 338.

It is not the duty of the proprietor of a mill who employs an experienced carpenter to work in repairing a portion of the mill building, including an elevator well, to warn such carpenter that a pipe-shaped cylinder in plain sight near the elevator well is a revolving shaft on which his clothing is likely to be caught if he puts his arm around it. *Brousseau* v. *Edward J. Cross Co.* 541.

Actions for death of employee.

See *post*, subtitle, *Causing Death.*

Workmen's compensation.

For proceedings under the workmen's compensation act, see WORKMEN'S COMPENSATION ACT.

Street Railway.

Nature of care required of company.

Definition of the phrase, "highest degree of care," and of the word "negligence" as it is used in St. 1907, c. 392, § 1, see *Buckley* v. *Boston Elevated Railway*, 50.

Persons on highway.

A traveller on a public way, either on foot or driving in a vehicle, while he is required at all times to exercise reasonable prudence, has a right to rely to a certain extent on the assumption that a motorman operating a street railway car when approaching the crossing of an intersecting street will take ordinary precautions to avoid a collision. *Scanlon* v. *Berkshire Street Railway*, 554.

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Application of the foregoing rule in an action for the death of an experienced teamster, who when attempting to cross a much travelled street where street cars were operated, after having seen an approaching car, was struck by the car. *Scanlon* v. *Berkshire Street Railway*, 554.

A boy who, when attempting to cross a street in front of an electric street car, became confused by the ringing of the gong and was run over, was held not as a matter of law to have been lacking in due care. *Giaccobe* v. *Boston Elevated Railway*, 224.

Lack of due care of a boy five years and eleven months of age running across a reserved space in the middle of a street in front of a street car. *Kyle* v. *Boston Elevated Railway*, 260.

Lack of due care on the part of a girl seven years of age in running across a street railway track in front of a plainly visible and rapidly approaching car. *Walukewich* v. *Boston & Northern Street Railway*, 262.

A boy six years and eight months of age, who is playing tag with two other boys on a city street with parallel street railway tracks, on which he knows that cars are passing frequently at all times of day, and, being absorbed wholly in his play, runs in front of an approaching street railway car which is so near that it strikes him with hardly an appreciable interval of time as soon as he reaches the track, is not in the exercise of any care at all, and consequently cannot recover for his injuries thus caused, assuming that the motorman was negligent. *Godfrey* v. *Boston Elevated Railway*, 432.

Evidence which was held to warrant a finding that a girl eight and one-fourth years of age, who was run into by a street railway car as she was crossing a street at a place other than a cross walk and in a diagonal direction to go to a certain store, was in the exercise of due care. *Sheehan* v. *Boston & Northern Street Railway*, 463.

At the trial of an action against the street railway company for personal injuries so received, where it appeared that, where she crossed, the sidewalk was sixteen to eighteen feet from the car track, the defendant was held to be entitled to have the jury instructed that the plaintiff had "no right to assume that the motorman would look out for her safety to the extent that she was relieved from taking any precautions whatever for her own safety while walking a distance of sixteen to eighteen feet." *Ibid.*

In order to recover, in an action under St. 1907, c. 392, against a street railway company for the death of a person, not a passenger, it is necessary for the plaintiff to prove that the decedent was giving reasonably intelligent and energetic attention to his own safety when he was injured, and it is not enough to show a negative and passive freedom from fault on his part. *Bothwell* v. *Boston Elevated Railway*, 467.

Boy, who, frightened by a Chinaman whom he had been annoying, ran into a street in front of a street railway car and was killed, was held not to have been in the exercise of the due care required by St. 1907, c. 392. *Ibid.*

In an action against a street railway company for injuries to a boy ten years of age, who was riding a bicycle down a street with a sharp grade crossed at its foot by a track of the defendant, and who came into collision with a car of the defendant, it was held that the question of the negligence of the defendant's motorman was for the jury. *Bosquet* v. *Worcester Consolidated Street Railway*, 538.

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Passengers.

The word "negligence," as used in St. 1907, c. 392, § 1, giving a right of action where "a corporation which operates a railroad or a street railway, by reason of . . . the . . . negligence of its servants or agents . . . causes the death of a passenger," means the want of care which the law requires under the circumstances disclosed in each case. *Buckley* v. *Boston Elevated Railway*, 50.

If a street railway car, after stopping at a regular stopping place to enable a passenger to alight, starts suddenly when the passenger is in the act of alighting and the passenger is injured, these facts, unexplained, are evidence of negligence on the part of either the conductor or the motorman of the car. *Gray* v. *Boston Elevated Railway*, 143.

In an action against a corporation operating a street railway for personal injuries caused by the plaintiff falling or being thrown from a car of the defendant, it is proper for the presiding judge to exclude testimony, offered by the defendant, of a witness who did not see the accident, that while the plaintiff was being picked up after his injury the witness heard some noise and heard somebody say, "It was his own fault," this being merely hearsay evidence of the expression of an opinion by an unknown person, and not a part of the *res gestæ*. *Ibid.*

In an action against a street railway company by a passenger, where the plaintiff's evidence tends to show that, as he was in the act of alighting from a car of the defendant which was "slowing up" preparatory to coming to a stop at the farther crosswalk at an intersecting street, the car suddenly moved forward and he was thrown to the ground near the nearer crosswalk, the defendant, to show a reason for the car "slowing up" and for its not stopping in front of the intersecting street, may introduce in evidence a municipal ordinance and a regulation which required the car to be so operated. *Callahan* v. *Boston Elevated Railway*, 171.

In an action by an administrator against a corporation operating a street railway for causing the suffering and death of the plaintiff's intestate, if the defendant's evidence is to the effect that the plaintiff's intestate was standing on the rear platform of an open car of the defendant, which was moving at the rate of eight or ten miles an hour on a straight track, when the intestate in some way fell off the car to the left, and that there was no chain in position, and if there is no evidence that the car was equipped with chains or that there was any requirement to use chains, the presiding judge properly may instruct the jury that, if they find upon the weight of the testimony that the plaintiff's intestate fell off the platform while the car was in motion, substantially as testified by the defendant's witnesses, there is no ground for recovery. *Slotofski* v. *Boston Elevated Railway*, 318.

It is not evidence of negligence on the part of a street railway corporation, that it operated an eight wheeled open passenger car having upon the running board on each side four iron wheel guards about twelve inches high which extended half the width of the running board, and that a passenger was injured by reason of stepping on one of these guards in alighting from the car, where it also appears that cars of this type had been in common use for more than four years. *Aducci* v. *Boston Elevated Railway*, 336.

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Elevated Railway.

Definition of the phrase, "highest degree of care" and of the word "negligence" as it is used in St. 1907, c. 392, § 1, see *Buckley* v. *Boston Elevated Railway*, 50.

Railroad.

Definition of the phrase, "highest degree of care" and of the word "negligence" as it is used in St. 1907, c. 392, § 1, see *Buckley* v. *Boston Elevated Railway*, 50.

It is evidence of negligence on the part of the servants of a railroad corporation, that they left a coal car standing on a track in a freight yard so near a converging track that a brakeman standing on a ladder attached to the side of a car passing on such converging track would be crushed between the cars. *Parmelee* v. *New York Central & Hudson River Railroad*, 294.

In an action against a railroad corporation by a teamster for personal injuries sustained from a door of a sealed car in a freight yard of the defendant falling upon the plaintiff when he was attempting to open the door for the purpose of unloading the car, if it appears that the defendant had placed the car on its delivery track and, through a clerk, had pointed out the car to the plaintiff, this can be found to have constituted a representation by the defendant to the plaintiff that the car was in a suitable place and condition for him to unload it, and a permission, if not an invitation, to him to unload it. *Corbett* v. *New York Central & Hudson River Railroad*, 435.

In the above described action an instruction, to the effect that the defendant was not liable unless the car had been in the freight yard long enough for the defendant to inspect it, was said to have been unnecessarily favorable to the defendant, because the defendant's liability did not depend on whether it had had a reasonable opportunity to inspect the car but on its failure to use reasonable care to see that the car was in a condition to be unloaded safely by the plaintiff. *Ibid.*

In Use of Highway.

It does not show negligence as matter of law on the part of a boy seven years and eight months of age, that he attempted to cross a street in front of an electric street railway car, which he saw coming slowly two hundred and fifty feet away, when he thought that he could "get by;" nor does it as matter of law show such negligence, that, when he was between the rails of the track and was startled by the ringing of a bell and looked up and saw the car fifteen or twenty feet away approaching at great speed, he tried to get back but could not and the car struck him. *Giaccobe* v. *Boston Elevated Railway*, 224.

If a boy, five years and eleven months old, who has been playing in a park with three or four other boys somewhat older than himself, starts with the other boys to run across a reserved space in the middle of the street in front of a street railway car which is approaching rapidly, and, following the other boys, gets only half way across the track when he is struck by the car, he is negligent as matter of law. *Kyle* v. *Boston Elevated Railway*, 260.

If a girl seven years of age, whether following playmates or not, starts across a street railway track in front of a plainly visible and rapidly approaching car, which is so near that she barely has got upon the track when the car strikes her, she is negligent as matter of law, there being nothing to show

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that she was in the exercise of any care at all. *Walukewich* v. *Boston & Northern Street Railway*, 262.

A boy six years and eight months of age, who is playing tag with two other boys on a city street with parallel street railway tracks, on which he knows that cars are passing frequently at all times of day, and, being absorbed wholly in his play, runs in front of an approaching street railway car which is so near that it strikes him with hardly an appreciable interval of time as soon as he reaches the track, is not in the exercise of any care at all, and consequently cannot recover for his injuries thus caused, assuming that the motorman was negligent. *Godfrey* v. *Boston Elevated Railway*, 432.

Evidence which was held to warrant a finding that a girl eight and one-fourth years of age, who was run into by a street railway car as she was crossing a street at a place other than a cross walk and in a diagonal direction to go to a certain store, was in the exercise of due care. *Sheehan* v. *Boston & Northern Street Railway*, 463.

At the trial of an action against the street railway company for personal injuries so received, where it appeared that, where the girl crossed, the sidewalk was sixteen to eighteen feet from the car track, the defendant was held to be entitled to have the jury instructed that the plaintiff had "no right to assume that the motorman would look out for her safety to the extent that she was relieved from taking any precautions whatever for her own safety while walking a distance of sixteen to eighteen feet." *Ibid.*

Boy, who, frightened by a Chinaman whom he had been annoying, ran into a street in front of a street railway car and was killed, was held not to have been in the exercise of the due care required by St. 1907, c. 392. *Bothwell* v. *Boston Elevated Railway*, 467.

A traveller on a public way, either on foot or driving in a vehicle, while he is required at all times to exercise reasonable prudence, has a right to rely to a certain extent on the assumption that a motorman operating a street railway car when approaching the crossing of an intersecting street will take ordinary precautions to avoid a collision. *Scanlon* v. *Berkshire Street Railway*, 554.

Application of the foregoing rule in an action for the death of an experienced teamster, who when attempting to cross a much travelled street where street cars were operated, after having seen an approaching car, was struck by the car. *Ibid.*

In an action against a street railway company for causing the death of the plaintiff's intestate, who was driving a pair of horses attached to a cart from an intersecting street across a track of the defendant, when his cart was struck by a car moving at an excessive rate of speed, the jury from their experience and common knowledge may infer that the intestate did not intend deliberately to expose himself and his employer's property to the chance of injury by attempting to pass in front of an approaching car when it was so near that a collision appeared to be unavoidable. *Ibid.*

In an action of tort for damage to an automobile alleged to have resulted from a collision with an automobile of the defendant in the State of Vermont, it was held that the common law of Vermont, relating to a violation of a statute requiring the licensing of the operation of an automobile, must be presumed to be the same as that of this Commonwealth, namely, that if the operation of the automobile without a license was not a cause contrib-

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uting to the injury to the plaintiff, it did not bar recovery by the plaintiff. *Holden* v. *McGillicuddy*, 563.

Use of a bicycle on a highway. See next subtitle.

In Use of Bicycle.

It is not negligence as matter of law for a boy ten years of age to ride a bicycle, which has no brake, down a street with a sharp grade which is crossed at its foot by a street railway track. *Bosquet* v. *Worcester Consolidated Street Railway*, 538.

In an action by such a boy against a street railway company for injuries caused by his coming into collision with a street car, it was held that on the evidence a finding was warranted that the boy was in the exercise of due care and that the motorman of the car was negligent. *Ibid.*

In the same case it was held that certain evidence of what the plaintiff's mother "quite a while before" had said to him about riding down the street well might have been excluded on the ground that it was too remote. *Ibid.*

In Use of Wagon.

In an action by an inexperienced teamster against a lumber company by which he was employed, for personal injuries caused by the tipping over upon the plaintiff of a loaded lumber wagon when it was being driven into a field to unload the lumber, it was held that there was evidence tending to show that, due to defects, the wagon was less stable than it should have been, and that it was a question for the jury to determine, whether the accident was due to a defective wagon provided by the defendant. *Simonds* v. *Interstate Lumber Co.* 263.

It also was held that the question, whether the driver was in the exercise of due care in walking on the downhill side of the wagon, was for the jury. *Ibid.*

In Freight Yard.

In an action by the administrator of the estate of a freight brakeman against a railroad corporation for causing the death of the plaintiff's intestate while he was engaged in uncoupling a box freight car from a switching engine in a freight yard and was standing on the lowest round of a ladder attached to the side of the car, where he was caught between the car he was on and a coal car, which negligently had been left standing on a converging track so near that there was not room for the body of a man between the two cars, it was held, that the question whether the intestate was in the exercise of due care was for the jury. *Parmelee* v. *New York Central & Hudson River Railroad*, 294.

It is evidence of negligence on the part of the servants of a railroad corporation, that they left a coal car standing on a track in a freight yard so near a converging track that a brakeman standing on a ladder attached to the side of a car passing on such converging track would be crushed between the cars. *Ibid.*

Action against a railroad corporation by a teamster for personal injuries sustained from a door of a sealed car in a freight yard of the defendant falling upon the plaintiff when he was attempting to open it for the purpose of un-

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loading the car. *Corbett* v. *New York Central & Hudson River Railroad*, 435.

Failure to Light Hallway.

It seems that, if a professional nurse comes at the call of a physician to attend a patient in a house owned and controlled by such patient and occupied by him with his wife, the wife of the patient owes the nurse no duty to maintain a light in the hallway of the house so that the nurse can pass through it in safety, unless the wife has undertaken this duty by promising the nurse that she will maintain such a light and the nurse relies upon the assurance. *McLeod* v. *Rawson*, 257.

Facts which were held to show that the wife did undertake such duty and performed it in so negligent a manner that she turned off the light without any warning, thereby causing the nurse to fall down a stairway and to receive injuries for which she was allowed to recover in an action against the wife. *Ibid.*

In such action it was held that it could not be said as a matter of law that the nurse was careless in relying on the light in question to indicate the location of the stairway after the assurance given her by the patient's wife. *Ibid.*

Of one controlling Real Estate.

The owner of a building in the city of Boston, to which St. 1892, c. 419, § 66, applied and which was occupied by a tenant to whom it was leased by an unrecorded lease for twenty years, was held by reason of certain provisions in the lease not to be liable to a person injured from slipping on ice on the adjoining sidewalk formed by water discharged from a spout attached to the building. *Cerchione* v. *Hunnewell*, 588.

The owner of a building, which is constructed without any provision for artificial light, who has let it to a tenant under a lease giving the tenant control of the halls and stairways and providing that repairs shall be made by the tenant, is not liable to a subtenant, or to one coming by rightful invitation to a room hired by such subtenant, for personal injuries from falling down a staircase by reason of the darkness of a hallway in the building. *Stone* v. *Lewis*, 594.

In a Laundry.

Action against the proprietor of a laundry for personal injuries sustained by a girl seventeen years of age from her hand being caught between the rollers of a steam mangle at which she was working. *Oswald* v. *Donohue*, 574.

In a Sand or Gravel Pit.

If a workman, who, while employed in removing a hill or bank of sand and gravel, by reason of assurance of his safety negligently communicated to him by his superintendent continues to work on a slope and, when an overhang breaks off, receives injuries which cause his death after conscious suffering, the employer is not liable at common law to the administrator of the estate of the workman for the suffering caused by his injuries, because at common law the superintendent was a fellow servant of the injured workman. *Polvere* v. *Hugh Nawn Contracting Co.* 199.

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But in an action under the employers' liability act for causing the death of the workman, there was held to be evidence that the death was caused by the negligence of a superintendent of the defendant. *Polvere* v. *Hugh Nawn Contracting Co.* 199.

In Use of "Green Horse."

If an express company permits a "green horse," which it has owned only for three days and about whose disposition and training it knows nothing, to be driven through one of the busiest parts of a large city where upon meeting an electric car it shies across a sidewalk and breaks a shop window, these facts are evidence of negligence on the part of the express company, on which it can be found to be liable to the proprietor of the shop for the damage caused by the breaking of the window. *Raymond Syndicate* v. *American Express Co.* 140.

In such an action, the jury may assume as a matter of common knowledge that a "green horse" is one understood to be fresh from the country and entirely unwonted to the distracting conditions of the business streets of a great city. *Ibid.*

Causing Death.

What is the due care required of a decedent by the statute.

In order to recover, in an action under St. 1907, c. 392, against a street railway company for the death of a person, not a passenger, it is necessary for the plaintiff to prove that the decedent was giving reasonably intelligent and energetic attention to his own safety when he was injured, and it is not enough to show a negative and passive freedom from fault on his part. *Bothwell* v. *Boston Elevated Railway*, 467.

What "negligence" makes defendant liable under the statute.

The word "negligence," as used in St. 1907, c. 392, § 1, giving a right of action where "a corporation which operates a railroad or a street railway, by reason of . . . the . . . negligence of its servants or agents . . . causes the death of a passenger," means the want of care which the law requires under the circumstances disclosed in each case. *Buckley* v. *Boston Elevated Railway*, 50.

Actions against employers.

Under R. L. c. 175, § 66, a declaration of a deceased workman, who had come to this country eighteen months before the accident that caused his death, that his elderly parents, whom he left in the country of his birth, were in need of the money that he sent to them from his wages earned here, may be found to have been based on facts known to the declarant before he left the foreign country and thus to have been made upon his personal knowledge. *Polvere* v. *Hugh Nawn Contracting Co.* 199.

Testimony, in an action under the employers' liability act for causing the death of a workman of the defendant, as to a statement by the workman that his parents in Italy were in need of money because they did not get any money from the crops, that their farm was bad, and that "the crops had come and there was not enough to pay the interest for hiring the place," was held to refer to crops after the deceased workman had left Italy so that his declara-

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tion concerning them could not have been made upon his personal knowledge and should have been excluded under R. L. c. 175, § 66. *Polvere* v. *Hugh Nawn Contracting Co.* 199.

In an action under the employers' liability act for causing the death of a workman, who, while employed in removing a hill or bank of sand and gravel, by reason of assurance of his safety negligently communicated to him by his superintendent continued to work on a slope and, when an overhang broke off, received injuries from which he died, there was held to be evidence that the death was caused by negligence of the superintendent of the defendant. *Ibid.*

Actions against street railway corporations.

At the trial of an action for the conscious suffering and death of one alleged to have lost his life by reason of negligence of an employee of a street railway company, evidence is admissible, for the purpose of proving the state of mind of the injured person after the injury and, by inference, his mental suffering, which tends to show that he said, after the accident and before the bringing of the action, that his back was broken and he knew that he was not going to get better. *Buckley* v. *Boston Elevated Railway*, 50.

Evidence tending to show that, while a boy was engaged with others in annoying a Chinaman who was lawfully at work upon his own premises, he became frightened by the conduct of the Chinaman and ran into a street in front of a street railway car by which he was run over and killed, is not evidence of the due care which by St. 1907, c. 392, is made a prerequisite to a recovery against the street railway company for such a death. *Bothwell* v. *Boston Elevated Railway*, 467.

Action for the death of an experienced teamster who was run into by an electric car when, from an intersecting street, he was trying to cross a street where cars ran, after having seen the car approaching. *Scanlon* v. *Berkshire Street Railway*, 554.

Compliance with Municipal Ordinances and Regulations as Proof of Due Care.

In an action against a street railway company by a passenger, where the plaintiff's evidence tends to show that, as he was in the act of alighting from a car of the defendant which was "slowing up" preparatory to coming to a stop at the farther crosswalk at an intersecting street, the car suddenly moved forward and he was thrown to the ground near the nearer crosswalk, the defendant, to show a reason for the car "slowing up" and for its not stopping in front of the intersecting street, may introduce in evidence a municipal ordinance and a regulation which required the car to be so operated. *Callahan* v. *Boston Elevated Railway*, 171.

Res ipsa loquitur.

If a street railway car, after stopping at a regular stopping place to enable a passenger to alight, starts suddenly when the passenger is in the act of alighting and the passenger is injured, these facts, unexplained, are evidence of negligence on the part of either the conductor or the motorman of the car. *Gray* v. *Boston Elevated Railway*, 143.

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NEWSPAPER.

In order that a report in a newspaper of an indictment found by a grand jury should constitute a privileged communication, for which the publisher cannot be held liable in an action of tort for libel, such report not only must be fair and impartial but also must be accurate. *Sweet* v. *Post Publishing Co.* 450.

In an action of tort, by an attorney at law against the publisher of a newspaper for an alleged libel in publishing an article naming the plaintiff as one of several persons indicted and arrested for conspiracy to defraud and identifying him by description, it is no defense that the defendant by an honest mistake referred to and described the plaintiff instead of another person of a similar name, that the defendant exercised reasonable care and diligence in trying to ascertain the facts before publishing the report and that the mistake occurred in spite of such care and diligence. *Ibid.*

Whether evidence of such care and diligence would be admissible in mitigation of damages was not considered. *Ibid.*

Other actions of tort for alleged libel against publishers of newspapers, see *Robinson* v. *Coulter*, 566; *Stearns* v. *Long*, 152.

NEW TRIAL.

See that subtitle under PRACTICE, CIVIL.

NOTICE.

In a suit in equity by an investor against the successors of trustees to whom a single trustee had conveyed without consideration certain land which he held subject to a trust providing for repayment to the plaintiff of his investment, the trust was enforced although the defendants' predecessors in office had had no notice of it. *Bisbee* v. *Mackay*, 21.

If a check payable to the order of a town is indorsed in blank in the name of the town by the treasurer of the town and is deposited in a bank by one of the bank's customers not connected with the town, this is notice to the bank of a defect in the title of the depositor. *Franklin Savings Bank* v. *International Trust Co.* 231.

Notice to a second pledgee of securities of bad faith or fraud on the part of the first pledgee. *Warfield* v. *Adams*, 506.

NUISANCE.

The owner of a building in the city of Boston, to which St. 1892, c. 419, § 66, applied and which was occupied by a tenant to whom it was leased by an unrecorded lease for twenty years, was held, by reason of certain provisions in the lease, not to be liable to a person injured from slipping on ice on the adjoining sidewalk formed by water discharged from a spout attached to the building. *Cerchione* v. *Hunnewell*, 588.

The owner of a building, which is constructed without any provision for artificial light, who has let it to a tenant under a lease giving the tenant control of the halls and stairways and providing that repairs shall be made by the tenant, is not liable to a subtenant, or to one coming by rightful invitation to a room hired by such subtenant, for personal injuries from falling down a stairway by reason of the darkness of a hallway in the building. *Stone* v. *Lewis*, 594.

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NURSE.

It seems that, if a professional nurse comes at the call of a physician to attend a patient in a house owned and controlled by such patient and occupied by him with his wife, the wife of the patient owes the nurse no duty to maintain a light in a hallway of the house so that the nurse can pass through it in safety, unless the wife has undertaken this duty by promising the nurse that she will maintain such a light and the nurse relies upon the assurance. *McLeod* v. *Rawson*, 257.

Facts which were held to show that the wife did undertake such duty and performed it in so negligent a manner that she turned off the light without any warning, thereby causing the nurse to fall down a stairway and to receive injuries for which she was allowed to recover in an action against the wife. *Ibid.*

In such action it was held that it could not be said as a matter of law that the nurse was careless in relying on the light in question to indicate the location of the stairway after the assurance given her by the patient's wife. *Ibid.*

PARTITION.

Where an owner in common of certain land, in partition proceedings in the Probate Court instituted by him, makes no claim before the commissioners to the effect that a barn on the land belongs to him, and with his assent a decree is made setting off the land and barn to another, he is estopped thereafter to claim the barn as personal property belonging to him. *Cutter* v. *Cutter*, 24.

A levy and sale upon an execution of "all" the "right, title and interest" of the debtor in certain real estate described in the execution deed by metes and bounds, where the debtor's title in the real estate described is as one of several heirs of one who had died seised of several other parcels of real estate as well as the one described, while of no effect without the consent of the other heirs, is effectual, in case a portion of the premises described subsequently is set off to the judgment debtor in partition proceedings, to establish a title by estoppel in the purchaser at the sale to such interest in the portion thus set off by partition as was the judgment debtor's at the time of the sale. *Cressy* v. *Cressy*, 65.

PARTNERSHIP.

Principles upon which it is determined whether personal property held by trustees, the beneficial interest in which is in shareholders whose shares are represented by transferable certificates on which dividends are paid, is to be assessed for taxation under St. 1909, c. 490, Part I, § 23, cl. 5, as "personal property held in trust" or under § 27 as personal property employed in the business of a partnership. *Williams* v. *Milton*, 1.

Application of such principles, from which it was held that a certain instrument created an investment trust and not a partnership and that accordingly the personal property of the trust must be assessed for taxation under St. 1909, c. 490, Part I, § 23, cl. 5, and not under § 27. *Ibid.*

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Upon petitions for the abatement of taxes brought by the trustees under a deed of trust called the "General Investment Trust," by the terms of which the powers and duties of the trustees were essentially the same as those of the petitioners in Williams v. Milton, *ante*, 1, it was held, following that decision, that the beneficiaries were *cestuis que trust* and were not partners, and that the trust property was to be assessed for taxation accordingly. *Foster* v. *Boston*, 31.

Suit by a member of a partnership, consisting of the plaintiff, the defendant and a third person, for an accounting by the defendant for an option taken by the defendant in his own name for an extension of a lease held by the partnership, which option the defendant sold, appropriating the proceeds to his own use, where it appears that the option was acquired by the defendant as partnership property and thus was impressed with a trust in favor of the plaintiff and the third partner. *Lurie* v. *Pinanski*, 229.

In such suit it was held to be no defense to the plaintiff's right to an accounting, that before the defendant purchased the option for the renewal of the lease, the plaintiff attempted without success to get a lease of the premises for himself without the knowledge of his copartners, because the plaintiff's attempt to circumvent his copartners was not a part of the transaction for which the defendant is called to account and does not prevent the plaintiff, as to that transaction, from coming into court with clean hands. *Ibid.*

Whether a suit in equity by a member of a partnership, which had been composed of three persons, against the widow of one of the three partners, personally and as the executrix of his will under which she was the sole legatee and devisee, to set aside an accounting because of an alleged mutual mistake and to remedy the mistake, can be maintained without joining the third member of the partnership either as a plaintiff or a defendant, was not decided. *Bowker* v. *Torrey*, 547.

In order that a statement of a mechanic's lien claimed by a partnership may comply with the requirements of R. L. c. 197, § 6, that a statement of a lien shall be filed by "the person claiming it" and shall be "signed and sworn to by him or a person in his behalf," it is sufficient if it is signed in the name of the firm by one of the partners and is sworn to by that partner. *Lays* v. *Hurley*, 582.

Case in which there was evidence warranting a finding that acts of one partner, in signing and swearing to a statement in the name of a partnership composed of two brothers, were authorized and ratified by the other partner. *Ibid.*

PASSENGER.

Actions by passengers against street railway corporations, see NEGLIGENCE, *Street Railway*, Passengers.

PENSION.

Of members of police departments, see POLICE.

PERPETUITIES.

Certain provisions of a will were held not to be void because in violation of the rule against perpetuities. *Dodge* v. *Bennett*, 545.

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PERSONAL PROPERTY.

Where an owner in common of certain land, in partition proceedings in the Probate Court instituted by him, makes no claim before the commissioners to the effect that a barn on the land belongs to him, and with his assent a decree is made setting off the land and barn to another, he is estopped thereafter to claim the barn as personal property belonging to him. *Cutter* v. *Cutter*, 24.

Evidence, at the trial before a judge without a jury of an action of tort against the owner of a building for the alleged conversion of a ventilator and pipe attached thereto, upon which it was held that the judge could not be required as a matter of law to find and rule that the ventilator and pipe were personal property, and which warranted a finding for the defendant. *Natural Autoforce Ventilator Co.* v. *Winslow*, 462.

PLEADING, CIVIL.

Declaration.

A single action of tort cannot be maintained against two defendants unless they directly or indirectly co-operated in doing the alleged wrong; and a declaration with two counts, each alleging a separate tort committed by a different defendant, with no allegation of conspiracy or concert between them, will be held bad, on demurrer, for misjoinder of defendants. *Dickey* v. *Willis*, 292.

In an action of tort for a wrongful act alleged to have been committed by joint defendants, an allegation of conspiracy does not change the nature of the wrong alleged, but is simply a way of alleging joint action by the defendants. *Perry* v. *Hayes*, 296.

A promissory note under seal, although it is a contract under seal within the meaning of the statute of limitations, is none the less a promissory note and properly is declared upon as such. *Clark* v. *Pierce*, 552.

Demurrer.

Upon a demurrer to the declaration in an action of tort for libel, where the publication alleged is libellous without proof of special damage, the question whether the declaration contains a sufficient allegation that the plaintiff suffered special damage cannot be raised unless it is assigned as a cause of demurrer. *Robinson* v. *Coulter*, 566.

Upon a demurrer to the declaration in an action by a building contractor, who had a contract to build a schoolhouse for a town, against the proprietor of a newspaper for the publication of an alleged libel charging the plaintiff with a dishonest failure to comply with the requirements of his contract, where the declaration contains an averment that the words were published maliciously, it is not open to the defendant to contend that the statements were true or that they were privileged as a fair and reasonable comment and criticism on a matter of public interest, these being matters of defense which can be availed of only when they are set up in an answer, and which, even if they were open, would constitute no defense because the allegation of malice is admitted by the demurrer. *Ibid.*

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Answer.

In an action of tort by an executor for an alleged wrong done to his testator, the defense that the right of action died with the testator and did not survive to the executor under R. L. c. 171, § 1, is available under an answer which contains only a general denial. *Rockwell* v. *Furness*, 557.

In an action of contract, the defense, that the contract was invalid because it was made on the Lord's day, cannot be availed of if it is not set up in the answer. *Raymond* v. *Phipps*, 559.

In an action for personal injuries sustained by the plaintiff in the employ of the defendant, the defense that the plaintiff assumed the risk of the injury is not open to the defendant unless it is set up in the answer, and, when it is so set up, the burden is on the defendant to prove it. *Oswald* v. *Donohue*, 574.

Withdrawal of Plea.

The defendant in an action of contract may withdraw a plea of the statute of limitations. *Moore* v. *Stuart*, 456.

Question, whether the defendant by his testimony withdrew such a plea, is for the court. *Ibid.*

Proper way for the plaintiff to raise the question. *Ibid.*

Exceptions to the refusal of a judge to give to the jury certain instructions on the question, whether by his testimony a defendant had withdrawn a plea of the statute of limitations, which were overruled because the jury's finding on that question was a nullity which could not affect the plaintiff's rights. *Ibid.*

Determination of Pleadings.

Whether a party to an action by his testimony at a trial before a jury has withdrawn a plea of the statute of limitations is a question of law for the presiding judge and not a question of fact for the jury, because it is the duty of the court to determine what the pleadings are which present the issues of fact for the jury to pass upon. *Moore* v. *Stuart*, 456.

PLEDGE.

In the absence of a special agreement to that effect, a pledgee of securities has no right to pledge the securities to a third person as collateral security for a loan to himself. *Warfield* v. *Adams*, 506.

If a third person to whom securities are pledged by a pledgee has notice that the person who pledged them to him held them as pledgee, he is put on inquiry to ascertain whether such pledgee had authority to repledge the securities. *Ibid.*

Where a note secured by a pledge of securities contains a clause giving the pledgee the right to repledge the securities pledged to him, although not the right to sell them except in case of default, the authority to pledge the securities is confined to the original pledgee. *Ibid.*

A second pledgee, who was put upon inquiry as to the first pledgee's right to repledge and, if he had seen the note secured by the first pledge, might have become charged with knowledge of bad faith on the part of the first pledgee, nevertheless had a right to pursue the inquiry into the authority of the first pledgee to repledge by other means than the inspection of the note, and, if

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by such inquiry honestly conducted he learned that the right to repledge existed and gained no knowledge as to the bad faith of the first pledgee, he was not chargeable with such knowledge. *Warfield* v. *Adams*, 506.

POLICE.

Pension.

In St. 1909, c. 188, providing for the retirement and pensioning of members of the police department in cities other than Boston, which accept the provisions of the act, there is nothing which confines the giving of pensions to those who have been appointed under the civil service rules. *Moffatt* v. *Mayor of Lowell*, 92.

A superintendent of police in a city other than Boston, which accepts the provisions of that act, lawfully may be retired and pensioned under its provisions. *Ibid.*

St. 1903, c. 428, § 3, does not require a person retired under the provisions of the act to reside constantly in the city that pays him such a pension during the time that he is receiving it, and he does not lose his right to receive the pension by being absent from the Commonwealth during one half of each year, if he keeps the police department informed of his whereabouts and is ready at any time to return and perform temporary service whenever it may be required of him. *Ibid.*

Nor need one so retired and pensioned keep the mayor of such city informed of his whereabouts during absences from the city. *Ibid.*

POLICE, DISTRICT AND MUNICIPAL COURTS.

Municipal Court of the City of Boston, see that title.

POWER.

Surety on the probate bond of one of two trustees was held not to have any right in the principal of the trust by reason of subrogation to rights of the other trustee, who had as to the principal merely a power of appointment by will over a certain portion of the principal of the trust. *Harmon* v. *Weston*, 242.

PRACTICE, CIVIL.

Removal from State to United States Court.

An order of the Superior Court granting a petition for the removal of an action entered therein to a district court of the United States is a final judgment which disposes of the whole case in the Superior Court, and an appeal lies therefrom which brings before this court the question, whether, as a matter of law on the face of the record, the case is a proper one for removal. *Long* v. *Quinn Brothers*, 85.

An action brought in a State court is not one "arising under the Constitution or laws of the United States," so that the defendant would be entitled as a matter of law to have it removed to a United States court, unless it appears

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to be such from the plaintiff's statement of his cause of action in his writ, declaration, petition or other pleading. *Long* v. *Quinn Brothers*, 85.

And if the plaintiff's pleadings at the time when the petition for removal is filed fail to disclose such an action, the defendant cannot prove it to be such upon averments in his petition for removal. *Ibid.*

Case where the averments in such a petition by the defendant failed to show that the plaintiff's cause of action arose under the Constitution or laws of the United States. *Ibid.*

Determination of Pleadings.

Whether a party to an action by his testimony at a trial before a jury has withdrawn a plea of the statute of limitations is a question of law for the presiding judge and not a question of fact for the jury, because it is the duty of the court to determine what the pleadings are which present the issues of fact for the jury to pass upon. *Moore* v. *Stuart*, 456.

Parties.

The receiver of the property of a corporation in suing for the price of goods sold by him as receiver must sue in his own name as such receiver; and, if he brings an action for the price of such goods in the name of the corporation by him as receiver, he is not entitled to recover, unless the defense that the action is brought by the wrong party is waived, as it was in the present case. *Rochester Tumbler Works* v. *Mitchell Woodbury Co.* 194.

Statements in a brief of the defendant in the Supreme Judicial Court which were held to constitute such a waiver. *Ibid.*

A single action of tort cannot be maintained against two defendants unless they directly or indirectly co-operated in doing the alleged wrong; and a declaration with two counts, each alleging a separate tort committed by a different defendant, with no allegation of conspiracy or concert between them, will be held bad, on demurrer, for misjoinder of defendants. *Dickey* v. *Willis*, 292.

Amendment.

The Superior Court has no power, after the commencement by trustee process of an action of tort for conversion and malicious use of civil process, to allow amendments changing the writ to one of summons and attachment and adding to the declaration a count for malicious prosecution. *Guarino* v. *Russo*, 83.

In an action by an administrator for causing the death of the plaintiff's intestate, where the allegations of the declaration warranted a finding that the cause of action relied on by the plaintiff when the action was commenced was under R. L. c. 106, § 72, and had been misdescribed, the allowance under R. L. c. 173, §§ 48, 121, of an amendment completing the statement of that cause of action is conclusive evidence of the identity of the cause of action. *Polvere* v. *Hugh Nawn Contracting Co.* 199.

Withdrawal of Plea.

The defendant in an action of contract may withdraw a plea of the statute of limitations. *Moore* v. *Stuart*, 456.

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Whether a party to an action by his testimony at a trial before a jury has withdrawn a plea of the statute of limitations is a question of law for the presiding judge and not a question of fact for the jury, because it is the duty of the court to determine what the pleadings are which present the issues of fact for the jury to pass upon. *Moore* v. *Stuart*, 456.

If the plaintiff in an action of contract, in which the defendant has pleaded the statute of limitations, thinks that the defendant by his testimony at the trial has withdrawn the plea of the statute and that in spite of such withdrawal the defendant's counsel is insisting on that defense, the remedy of the plaintiff is to file a motion to strike out the plea, and the judge then can decide whether the plea has been withdrawn. *Ibid.*

Exceptions to the refusal of a judge to give to the jury certain instructions on the question, whether by his testimony a defendant had withdrawn a plea of the statute of limitations, which were overruled because the jury's finding on that question was a nullity which could not affect the plaintiff's rights. *Ibid.*

Motion to Dismiss.

Where facts which show a want of jurisdiction in an attempted action appear upon the record, the proper way for the defendant to raise the objection is by a motion to dismiss. *Roberts* v. *Anheuser Busch Brewing Association*, 341.

Rules of Court.

Rule 3 of the Superior Court. *Norwood* v. *Dodge*, 351.

Agreed Statement of Facts.

Whether at the hearing upon an agreed statement of facts of a case involving the question, whether the Governor had exercised his veto power within the time prescribed in c. 1, § 1, art. 2 of the Constitution, the facts agreed upon would be competent evidence to controvert a statement of facts with regard to the veto appended by the Secretary of State as a note to the official printed copy of the statute, it here was not necessary to decide, because the facts set forth in the agreed statement were included in the secretary's note properly interpreted. *Tuttle* v. *Boston*, 57.

Hearing and Findings by Judge without Jury.

In an action at law a general finding by a judge sitting without a jury, like the verdict of a jury, cannot be revised upon questions of fact if it was warranted by the evidence. *New York, New Haven, & Hartford Railroad* v. *York & Whitney Co*, 36.

Audita querela is a common law writ, and, by R. L. c. 192, § 1, the rules of practice applicable to it are those prevailing in actions at law. Thus the findings of fact made by a judge of the Superior Court at the trial of such a writ are not to be revised, if there is any evidence to warrant them. *Parker* v. *Murphy*, 72.

In an action of tort for personal injuries, which is tried before a judge without a jury and in which the defendant's liability is admitted, where no ruling of law is asked for or made in regard to the amount of damages to be allowed for medical attendance, the amount of such damages is a matter of fact to

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be determined by the decision of the trial judge. In the present case it was said that, if the findings of the judge upon this matter were reviewable, this court saw no error in them. *Whitcomb* v. *New York, New Haven, & Hartford Railroad*, 440.

At the trial before a judge without a jury of an action of tort by a husband against a railroad corporation for consequential damages caused by personal injuries sustained by the plaintiff's wife in a collision of trains on the defendant's railroad, for which the plaintiff's wife in a previous action has recovered damages from the defendant, it was for the judge to say in the first place what injuries resulted from the accident and what, if any, diseases were set in motion by it as the direct and efficient cause, and then to say what medical and other attendance and treatment were reasonably necessary, and what was the fair value of the services and treatment so rendered. *Ibid.*

Conduct of Trial.

Preliminary inquiry by judge as to evidence.

Where a declaration of a deceased person is offered in evidence under R. L. c. 175, § 66, the presiding judge, while conducting a preliminary examination for the purpose of determining whether the declaration offered was made by the declarant under the conditions required by the statute, may direct that the jury be retired out of hearing. *Slotofski* v. *Boston Elevated Railway*, 318.

Evidence in rebuttal.

At the trial of a petition for damages to property by the alteration of a highway, where the respondent in defense has introduced evidence of benefits to the petitioner's property, it is within the discretionary power of the presiding judge to refuse to allow the petitioner to introduce evidence in rebuttal bearing upon such benefits and tending to diminish their value. *Slotofski* v. *Boston Elevated Railway*, 318.

Requests, rulings and instructions.

It is not good practice for counsel to suggest in the hearing of the jury instructions that he is willing should be given to the jury to correct what opposing counsel contends is an error in the judge's charge. *Buckley* v. *Boston Elevated Railway*, 50.

It is proper for a judge presiding at a trial to refuse a request for an instruction to the jury, that where "witnesses of equal candor, fairness and intelligence testify with equal opportunity of knowledge and memory, and their testimony is in all respects of equal weight and credibility and there is a conflict as to facts which cannot be reconciled, the number of witnesses then constitutes a preponderance and the verdict should be in harmony with the greater number of witnesses," if such a ruling is inapplicable to the facts because the witnesses did not have an equal opportunity of observation. *Gray* v. *Boston Elevated Railway*, 143.

In an action for a breach of contract to purchase milk from the plaintiff for a year, where the evidence of the plaintiff at the trial tended to show that in a conversation the defendant agreed to take milk from the plaintiff for a year, no mention being made as to when the year should begin, a certain instruction, given in the judge's charge as to a defense of the statute of frauds, was held to have covered all that the defendant asked for in a certain request

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for a ruling, so that no harm was done by a refusal to give the ruling in the form in which it was requested. *Raymond* v. *Phipps*, 559.

In an action of tort for an alleged conversion, tried in the Municipal Court of the City of Boston, certain requests for rulings involving findings of facts upon conflicting evidence were held properly to have been refused. *Cohen* v. *Berkowitz*, 68.

Exception by the defendant to a portion of the charge to the jury at the trial of an action for personal injuries and death, which, it was held, was rendered immaterial by a further instruction given by the judge at the suggestion of the plaintiff. *Buckley* v. *Boston Elevated Railway*, 50.

Argument before jury.

Argument by the plaintiff's counsel at the trial of an action against a street railway company for personal injuries and death, which was predicated on an assumption that the defendant had not produced witnesses to the accident whom it could have produced, and which was held to have been unfair and unwarranted by the evidence. *Buckley* v. *Boston Elevated Railway*, 50.

And if the defendant in such action has waived a motion under St. 1911, c. 593, that the plaintiff should be compelled to disclose the names of his witnesses, upon an agreement of the plaintiff's counsel to furnish their names, and the plaintiff's counsel in furnishing the names has omitted one of them through an innocent inadvertence, it is proper for the presiding judge to rule that the defendant's counsel in his argument to the jury cannot comment upon the omission. *Ibid.*

In an action of tort against a street railway company for personal injuries, where there is no question in regard to a failure of either party to produce evidence within his or its exclusive knowledge or control and where the plaintiff's counsel has not referred to the opportunity of the defendant to produce more witnesses than the plaintiff, it is proper for the presiding judge to refuse to allow the counsel for the defendant in his argument to the jury to refer to St. 1911, c. 593, which authorizes the court to compel either party upon terms to disclose the names and addresses of its witnesses. *Delaney* v. *Berkshire Street Railway*, 591.

Judge's charge.

In refusing to sustain an exception to the refusal of a presiding judge to give an instruction to the jury in the language requested although he gave it in substance, it was said, that the degree of amplification with which an applicable principle of law shall be stated to a jury as well as its phraseology rests almost wholly in the discretion of the presiding judge. *Delaney* v. *Berkshire Street Railway*, 591.

It is not good practice for counsel to suggest in the hearing of the jury instructions that he is willing should be given to the jury to correct what opposing counsel contends is an error in the judge's charge. *Buckley* v. *Boston Elevated Railway*, 50.

Exception by the defendant to a portion of the charge to the jury at the trial of an action for personal injuries and death, which, it was held, was rendered immaterial by a further instruction given by the judge at the suggestion of the plaintiff. *Ibid.*

Proper charge of a judge, at the trial of an action for personal injuries, as to the effect of the aggravation of the plaintiff's injuries by injurious treatment by a

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physician whom the plaintiff consulted in good faith. *Gray* v. *Boston Elevated Railway*, 143.

In the same action another portion of the judge's charge, to the effect that, in assessing damages for the loss of time of the plaintiff, who was a professor in a State university, the jury should consider the amount of his "average earnings, his professional reputation and his special attainments in his profession," was held to be proper. *Ibid.*

Proper instructions given by the judge to the jury at the trial of an action by a woman for an alleged breach of a contract in writing to furnish her with board and food during her life and also to pay her $10 monthly. *Soderlund* v. *Helman*, 542.

Instruction by a judge to a jury which was held to have been erroneous because the jury might have understood from it that, unless the language of a certain release was enlarged by the circumstances under which it was given, the plaintiff's claim was not barred by it. *Carr* v. *Weiss*, 532.

An instruction, at the trial of a petition by a foreign manufacturing corporation for damages resulting to it from the abolition of a grade crossing of a railroad with a private way, to the effect that the foreign corporation was not an inhabitant of the town where its factory was and had no right to petition the selectmen of the town under R. L. c. 48, § 65, for a new private way, was held not to have harmed the respondent because the judge immediately added that the corporation could make such an application to the county commissioners, who had power to deal with it, and fairly left it to the jury to say how far the value of the property and the amount of the damages to be assessed were affected by the possibility of such a way being laid out and constructed. *Cornell-Andrews Smelting Co* v. *Boston & Providence Railroad*, 381.

Ordering Verdict.

In an action of contract, where a substantial part of the evidence is oral or consists of inferences to be drawn from the circumstances shown, it seldom can be ruled that the party on whom the burden of proof rests is entitled to a verdict. *Coleman* v. *New York, New Haven, & Hartford Railroad*, 45.

New Trial.

Where at the trial of an action against a corporation operating a street railway for personal injuries sustained when alighting as a passenger from a car of the defendant, it appeared that one of the jury, more than six years before the trial, was injured in a collision with a car of the defendant and presented a claim for damages to the defendant, that no settlement of the claim was made and no action was brought, these facts were held under the circumstances not to be ground for disqualification of the juror as matter of law or for disturbing action of the trial judge in denying a motion of the defendant for a new trial. *Gray* v. *Boston Elevated Railway*, 143.

Whether, in ruling upon a motion by a defendant, after a verdict for the plaintiff, asking for a new trial on the grounds that the verdict was against the evidence, the weight of evidence and the law, and that the damages were excessive, it is proper for the trial judge to make an order that the motion shall be allowed, "provided" that the defendant files a waiver in writing of exceptions taken by him at the trial, the motion to be denied if no such waiver is

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filed, here was not determined, a new trial being ordered by this court on other grounds. *Cornell-Andrews Smelting Co.* v. *Boston & Providence Railroad*, 381.

Exceptions.

Matters not subject to exceptions.

Cases arising under the workmen's compensation act can be brought from the Superior Court before this court only by appeal and not by a bill of exceptions. *Gould's Case*, 480; *McNicol's Case*, 497.

No exception lies to the admission of a preliminary question to a witness which has not harmed the excepting party. *Stearns* v. *Long*, 152.

At the trial of a petition by a lessee of land against a railroad corporation for damages resulting from the abolition of a grade crossing of a private way with the railroad, where the lessor of the land has been admitted as an intervening petitioner, the railroad corporation, against whom the entire damages are to be assessed, has no right to raise the question, whether the damages shall be assessed and paid to a trustee according to the provisions of R. L. c. 48, §§ 17, 18, or shall be apportioned by the jury and paid to the various parties interested in accordance with §§ 20–24 of that chapter. *Cornell-Andrews Smelting Co.* v. *Boston & Providence Railroad*, 381.

Form of bill of exceptions.

In a bill of exceptions testimony should not be set forth at length by question and answer when its substance can be stated in a narrative form. *Cornell-Andrews Smelting Co.* v. *Boston & Providence Railroad*, 381.

The setting forth of exceptions to the manner in which a trial judge dealt with requests of various parties for rulings, by stating all of the requests at length without stating which were refused and which were granted and leaving this court to learn how the requests were dealt with from an examination of the charge to the jury and of colloquies between the judge and the counsel for the various parties, which also are set out in full, is a course which cannot be too strongly condemned. By SHELDON, J. *Ibid.*

Construction of bill of exceptions.

A trial judge erroneously omitted from his charge to the jury any instructions covering the plaintiff's contention. At the close of the charge, a colloquy took place at the bench, during which the judge made a statement which, if heard by the jury, would have cured his error. A bill of exceptions filed by the plaintiff stated that the judge's later statement was made "in the presence but not in the hearing of the jury." The bill afterwards was amended to state merely that the statement was made in a colloquy at the bench. The statement was taken down by a stenographer and bore the character of a statement to the jury. *Held*, that presumably the statement was heard by the jury, and, the bill not making manifest that it was not so heard, the plaintiff did not show that he was harmed by the error and the exception must be overruled. *Callahan* v. *Boston Elevated Railway*, 171.

Whether error, if any, was prejudicial: immateriality.

The burden is upon a party excepting to an erroneous ruling of a trial judge to make it manifest in his bill of exceptions that he was prejudiced by the error;

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and if the bill does not make it manifest that the error was to his prejudice, his exception will be overruled. *Callahan* v. *Boston Elevated Railway*, 171.

At the close of the judge's charge at a trial, the defendant objected to a certain portion of the charge, and the plaintiff's counsel, in the hearing of the jury, stated that he was willing that the jury should be instructed in a certain manner. The judge then, subject to an exception by the defendant, so charged the jury, stating that he did so "with the consent of the plaintiff," and it was held, that any error in the charge on the subject referred to was cured by the additional instructions given. *Buckley* v. *Boston Elevated Railway*, 50.

In the same case, it was held that, although it is not good practice for the counsel to suggest in the hearing of the jury instructions that he is willing should be given, no harmful error was shown in this case. *Ibid.*

An instruction, at the trial of petition by a foreign manufacturing corporation for damages resulting to it from the abolition of a grade crossing of a railroad with a private way, to the effect that the foreign corporation was not an inhabitant of the town where its factory was and had no right to petition the selectmen of the town under R. L. c. 48, § 65, for a new private way, was held not to have harmed the respondent because the judge immediately added that the corporation could make such an application to the county commissioners, who had power to deal with it, and fairly left it to the jury to say how far the value of the property and the amount of the damages to be assessed were affected by the possibility of such a way being laid out and constructed. *Cornell-Andrews Smelting Co.* v. *Boston & Providence Railroad*, 381.

A defendant was held not to have been harmed by a ruling excluding certain evidence where the facts which it tended to show were shown by other evidence which was admitted. *Bosquet* v. *Worcester Consolidated Street Railway*, 538.

In an action by a woman for an alleged breach of a contract in writing to furnish her with board and food during her life and also to pay her $10 monthly, the defendant is not harmed by the admission of the testimony of a deputy sheriff introduced by the plaintiff to show the service upon the defendant of a demand by the plaintiff's attorney for the payment of all money due under the contract, even if as matter of law no such demand was necessary. *Soderlund* v. *Helman*, 542.

In an action for a breach of contract to purchase milk from the plaintiff for a year, where the evidence of the plaintiff at the trial tended to show that in a conversation the defendant agreed to take milk from the plaintiff for a year, no mention being made as to when the year should begin, a certain instruction, given in the judge's charge as to a defense of the statute of frauds, was held to have covered all that the defendant asked for in a certain request for a ruling, so that no harm was done by a refusal to give the ruling in the form in which it was requested. *Raymond* v. *Phipps*, 559.

Exceptions to the refusal of a judge to give to the jury certain instructions on the question, whether by his testimony a defendant had withdrawn a plea of the statute of limitations, which were overruled because the jury's finding on that question was a nullity which could not affect the plaintiff's rights. *Moore* v. *Stuart*, 456.

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Report.

St. 1912, c. 317, providing that "if the justice who presides at a trial has reserved a case for report to the Supreme Judicial Court, or to the full court, and fails, by reason of physical or mental disability, death or resignation, to make such report, any other justice of the same court may examine and report the same," is constitutional. *Godfrey* v. *Boston Elevated Railway*, 432.

At the argument before this court, upon a report by a judge of the Superior Court, of the question of law, whether the instructions of a trial judge to a jury, upon the assessment of damages for the taking of an easement in a strip of land of a petitioner for the purpose of constructing and maintaining a sewer, were correct, it is not open to the respondent to argue that the amount of damages found by the jury was excessive, that having no bearing upon the question before this court, although it might properly have been addressed to the trial judge in support of a motion for a new trial. *Holyhood Cemetery Association* v. *Brookline*, 255.

Appeal.

Cases arising under the workmen's compensation act can be brought from the Superior Court before this court only by appeal and not by a bill of exceptions. *Gould's Case*, 480; *McNicol's Case*, 497.

Audita querela is a common law writ, and, by R. L. c. 192, § 1, the rules of practice applicable to it are those prevailing in actions at law. Thus the findings of fact made by a judge of the Superior Court at the trial of such a writ are not to be revised, if there is any evidence to warrant them. *Park* v. *Murphy*, 72.

An order of the Superior Court granting a petition for the removal of an action entered therein to a district court of the United States is a final judgment which disposes of the whole case in the Superior Court, and an appeal lies therefrom which brings before this court the question, whether, as a matter of law on the face of the record, the case is a proper one for removal. *Long* v. *Quinn Brothers*, 85.

Under St. 1912, c. 649, § 8, and Rule E of the Municipal Court of the City of Boston, no appeal lies to this court from a decision of the Appellate Division of the Municipal Court of the City of Boston upon a petition for the establishing of exceptions taken to rulings of the judge presiding at a trial in that court. *Cohen* v. *Berkowitz*, 68.

Matters of procedure with regard to appeals from the Appellate Division of the Municipal Court of the City of Boston to the Supreme Judicial Court, see MUNICIPAL COURT OF THE CITY OF BOSTON, *Appellate Division*.

Argument and Brief before Full Court.

At the argument before this court of the question of law, whether the instructions of a trial judge to a jury, upon the assessment of damages for the taking of an easement in a strip of land of a petitioner for the purpose of constructing and maintaining a sewer, were correct, it is not open to the respondent to argue that the amount of damages found by the jury, was excessive, that having no bearing upon the question before this court, although it might properly have been addressed to the trial judge in support of a motion for a new trial. *Holyhood Cemetery Association* v. *Brookline*, 255.

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Statements in the brief of a defendant in the Supreme Judicial Court, which were held to constitute a waiver of a right to object to the form of the writ and of the defense that the action was brought by the wrong party. *Rochester Tumbler Works* v. *Mitchell Woodbury Co.* 194.

Ordering of Judgment under St. 1909, c. 236.

The provision of St. 1909, c. 236, § 1, that, in a case before this court on an exception by a defendant to a refusal of a presiding judge to order a verdict for such defendant, this court, if the defendant's exception is sustained, may by rescript direct the entry in the trial court of judgment for the defendant, does not violate the right to a trial by jury which is guaranteed by art. 15 of the Declaration of Rights. *Bothwell* v. *Boston Elevated Railway*, 467.

Costs.

The provision in R. L. c. 12, § 81, (now St. 1909, c. 490, Part I, § 80,) that, in a proceeding upon a petition in the Superior Court appealing from the refusal of the assessors of a city or town to abate a tax, "if no abatement is granted, judgment shall be rendered for the city or town for its expenses and costs, which shall be taxed by the court," was held not to authorize the taxation of counsel fees paid by a town in favor of which a judgment is rendered on a refusal to grant an abatement. *Sears* v. *Nahant*, 234.

Counsel Fees.

Review by HAMMOND, J., of the leading cases in which this court has had occasion to consider whether the word "expenses" as used in a statute was or was not intended to included counsel fees. *Sears* v. *Nahant*, 234.

The provision in R. L. c. 12, § 81, (now St. 1909, c. 490, Part I, § 80,) that, in a proceeding upon a petition in the Superior Court appealing from the refusal of the assessors of a city or town to abate a tax, "if no abatement is granted, judgment shall be rendered for the city or town for its expenses and costs, which shall be taxed by the court," was held not to authorize the taxation of counsel fees paid by a town in favor of which a judgment is rendered on a refusal to grant an abatement. *Ibid.*

Proceedings for Abatement of Tax.

A proceeding upon a petition in the Superior Court under R. L. c. 12, § 78, appealing from the refusal of the assessors of a city or town to abate a tax, is in the nature of an action at law. *Sears* v. *Nahant*, 234.

The provision in R. L. c. 12, § 81, (now St. 1909, c. 490, Part I, § 80,) that, in a proceeding upon a petition in the Superior Court appealing from the refusal of the assessors of a city or town to abate a tax, "if no abatement is granted, judgment shall be rendered for the city or town for its expenses and costs, which shall be taxed by the court," was held not to authorize the taxation of counsel fees paid by a town in favor of which a judgment is rendered on a refusal to grant an abatement. *Ibid.*

Audita Querela.

See that title.

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Writ of Entry.

See that title.

Petition for Damages caused by Abolition of Grade Crossing.

At the trial of a petition by a lessee of land against a railroad corporation for damages resulting from the abolition of a grade crossing of a private way with the railroad, where the lessor of the land has been admitted as an intervening petitioner, the railroad corporation, against whom the entire damages are to be assessed, had no right to raise the question, whether the damages shall be assessed and paid to a trustee according to the provisions of R. L. c. 48, §§ 17, 18, or shall be apportioned by the jury and paid to the various parties interested in accordance with §§ 20–24 of that chapter. *Cornell-Andrews Smelting Co.* v. *Boston & Providence Railroad*, 381.

Upon the question being raised by the intervening petitioner, it was held, that the proceedings properly were under R. L. c. 48, §§ 20–24, and not under §§ 17, 18, of that chapter. *Ibid.*

An instruction, at the trial of a petition by a foreign manufacturing corporation for damages resulting to it from the abolition of a grade crossing of a railroad with a private way, to the effect that the foreign corporation was not an inhabitant of the town where its factory was and had no right to petition the selectmen of the town under R. L. c. 48, § 65, for a new private way, was held not to have harmed the respondent because the judge immediately added that the corporation could make such an application to the county commissioners, who had power to deal with it, and fairly left it to the jury to say how far the value of the property and the amount of the damages to be assessed were affected by the possibility of such a way being laid out and constructed. *Ibid.*

PRACTICE, CRIMINAL.

Sentence.

Since St. 1909, c. 442, took effect, a male person who commits the crime of uttering a forged order for money not exceeding $50 in value may be sentenced by a police, district or municipal court to imprisonment at hard labor in a house of correction. *Moulton* v. *Commonwealth*, 525.

Under St. 1906, c. 282, § 1, a sentence of a woman to imprisonment at hard labor in a house of correction for uttering a forged order for money not exceeding $50 in value is unauthorized, and, upon a writ of error, will be reversed. *Ibid.*

Imprisonment of Women.

Under St. 1906, c. 282, § 1, a sentence of a woman to imprisonment at hard labor in a house of correction for uttering a forged order for money not exceeding $50 in value is unauthorized, and, upon a writ of error, will be reversed. *Moulton* v. *Commonwealth*, 525.

St. 1906, c. 282, § 1, does not make the reformatory prison for women, when used for the punishment of felony, a branch of the State prison, and makes unlawful a sentence of a woman for a felony to a jail or a house of correction as well as a sentence to the State prison. *Ibid.*

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PROBATE COURT.

Jurisdiction.

Where a trust is created by an interlocutory decree made by the Superior Court in a suit in equity and a trustee is appointed under the general equity jurisdiction of the court with duties analogous to those of a receiver, such trustee is not required to give a bond to the judge of probate under R. L. c. 150, § 1, and his accounts as trustee can be settled in the original suit. *Rice* v. *Merrill*, 419.

Rights and Liabilities of Surety on Probate Bond.

The surety on a probate bond is liable jointly with his principal; and, if in an action on the bond no service has been made on the principal and he has not appeared, this does not affect the liability of the surety, who is liable for the default of the principal to the full extent of that default not exceeding the amount of the judgment for the penal sum of the bond. *Harmon* v. *Weston*, 242.

Surety on a probate bond of one of two trustees was held not to have any right in the principal of the trust by reason of subrogation to rights of the other trustee, who had as to the principal merely a power of appointment by will over a certain portion of the principal of the trust. *Ibid.*

In an action on a probate bond given by one of two trustees, in which judgment had been obtained against the defendant surety because of a misappropriation of trust funds by the trustee for whom the defendant was surety, it appeared that the two trustees were entitled to the whole income of the trust during their lives, and, because of an agreement as to subrogation made by them with the defendant, it was held that the defendant was subrogated to the rights of the two principals to receive the income from the entire trust fund for the period between the time of the misappropriation and the time of the death of the other trustee, and that, therefore, to avoid circuity of action, the income of the part of the trust fund that had been misappropriated would be regarded as fully accounted for by the trustees and was not to be included in the amount for which execution was to issue. *Ibid.*

Nature of execution which should issue in case of a judgment for the plaintiff in an action against the surety on a probate bond of a trustee. *Ibid.*

Where, in an action on a probate bond, judgment is entered for the penal sum of the bond with interest thereon, if the amount for which execution properly should issue exceeds such penal sum, the allowance of interest is correct as compensation for the wrongful detention of the money. *Ibid.*

And, even if the amount for which execution is to issue does not exceed such penal sum, it cannot be said that the defendant is harmed by the allowance of interest in the entry of judgment, for he can be held only for the amount for which execution is to issue. *Ibid.*

Appeal.

On an appeal from a decree of a single justice of this court allowing a widow under the provisions of R. L. c. 140, § 2, upon her petition filed a year and

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ten months after her husband's death, the sum of $1,500, it was held, after a review of the evidence and giving to the petitioner the benefit of the most favorable inference to be drawn from it, that $500 was a sum sufficient to provide for her necessities. *Glover* v. *Glover*, 576.

At the trial, on an appeal from a decree of the Probate Court allowing a will, of an issue, whether the will was procured by undue influence of the testator's widow, who was named as executrix, the widow, although a beneficiary under the will, is not an adverse party, and her failure to testify in support of the will is not evidence from which an inference can be drawn that, if she had testified, her testimony would have tended to prove the will invalid. *Aldrich* v. *Aldrich*, 164.

PUBLIC SERVICE CORPORATION.

As was pointed out in Weld v. Edison Electric Illuminating Co. 197 Mass. 556, the policy which has been developed in Massachusetts respecting the furnishing of artificial light is that of a regulated monopoly. By RUGG, C. J. *Attorney General* v. *Haverhill Gas Light Co.* 394.

A corporation, created by or organized under the laws of this Commonwealth for the purpose of manufacturing and selling gas for light and heat in a certain city, is a public service corporation, and, except by legislative authority, cannot part with its franchise and property in such a way as to deprive itself of the power to perform its public duties. *Ibid.*

RAILROAD.

Money, not intended for travelling expenses, in a handbag carried by a passenger in a railroad train is not baggage for the loss of which the corporation operating the railroad is liable. *Whitcomb* v. *New York, New Haven, & Hartford Railroad*, 440.

Definition of the phrase, "highest degree of care," and of the word "negligence" as it is used in St. 1907, c. 392, § 1, see *Buckley* v. *Boston Elevated Railway*, 50.

Liability for negligence, see NEGLIGENCE, *Railroad.*

RECEIVER.

The claims of holders of bonds of a street railway company, secured by a mortgage to a trust company, were held rightly to have been given priority, by a receiver appointed in a suit in equity to foreclose the mortgage, over a claim of a second street railway company for an agreed compensation for power, payments of which were two years in arrears, it not appearing that the delay in instituting the foreclosure proceedings was for the purpose of benefiting the mortgagee by the claimant's expenditures. *Old Colony Trust Co.* v. *Medfield & Medway Street Railway*, 156.

A release, executed and delivered by the receiver of the property of certain corporations to a person who owes the price of goods sold to him by such corporation and also owes the price of other goods sold to him by the receiver after his appointment, by which instrument the receiver agrees to discharge the debtor "from any further obligations or accounts due to the

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above named companies," does not discharge the debtor from his obligation to pay for the goods purchased by him from the receiver. *Rochester Tumbler Works* v. *Mitchell Woodbury Co.* 194.

The receiver of the property of a corporation in suing for the price of goods sold by him as receiver must sue in his own name as such receiver; and, if he brings an action for the price of such goods in the name of the corporation by him as receiver, he is not entitled to recover, unless the defense that the action is brought by the wrong party is waived, as it was in the present case. *Ibid.*

Statements in a brief of the defendant in the Supreme Judicial Court which were held to constitute such a waiver. *Ibid.*

A suit in equity by the surety on a probate bond, given by a trustee who was entitled to share as beneficiary in the income of the trust fund and who misappropriated a part of such trust fund, for the appointment of a receiver to hold the interest of such defaulting trustee, to which the plaintiff claimed to be subrogated, with directions to account to the plaintiff for the income during the lifetime of such defaulting trustee and on his death to pay to the plaintiff any part of the principal of the trust fund to which such defaulting trustee might be entitled, it was held, could not be maintained, where such defaulting trustee's interest in the principal of the trust fund was only a contingent power of testamentary appointment. *Harmon* v. *Weston*, 242.

REFERENCE AND REFEREE.

The objection, that a provision in a building contract, which makes the issuing of the final certificate by the architect conclusive as to the performance of the contract, is void as an attempt to oust the courts of their jurisdiction, is not open after the decision of the architect has been made and the parties have been notified of it without previous objection from either of them. *Hathaway* v. *Stone*, 212.

Referees appointed to determine the amount of a loss by fire under the Massachusetts standard form of fire insurance policy, set forth in St. 1907, c. 576, § 60, may determine the amount of such loss in any way that in the exercise of an honest discretion they may think wise, and their award will not be made invalid by a refusal in good faith to hear evidence offered by the insurance company as to the amount of the loss. *Hanley* v. *Aetna Ins. Co.* 425.

In an action on a policy of insurance against fire in the Massachusetts standard form, where the defendant relies on the defense that the award of the referees as to the amount of loss was invalid, because the referees had refused to hear evidence offered by the defendant, the burden is on the defendant to show that the evidence excluded was material and that the defendant has been harmed by the exclusion. *Ibid.*

REFORMATORY PRISON FOR WOMEN.

St. 1906, c. 282, § 1, does not make the reformatory prison for women, when used for the punishment of felony, a branch of the State prison, and makes unlawful a sentence of a woman for a felony to a jail or a house of correction as well as a sentence to the State prison. *Moulton* v. *Commonwealth*, 525.

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RELEASE.

A release, executed and delivered by the receiver of the property of certain corporations to a person who owes the price of goods sold to him by such corporations and also owes the price of other goods sold to him by the receiver after his appointment, by which instrument the receiver agrees to discharge the debtor "from any further obligations or accounts due to the above named companies," does not discharge the debtor from his obligation to pay for the goods purchased by him from the receiver. *Rochester Tumbler Works* v. *Mitchell Woodbury Co.* 194.

In an action of contract for a sum of money alleged to be due to the plaintiff, where the sole defense relied upon is a release in writing given by the plaintiff to the defendant and alleged by the defendant to include the plaintiff's present claim, if there is no ambiguity in the terms of the instrument, evidence of what was said in the negotiations that resulted in the execution and delivery of the release, although admitted without objection, cannot be considered in interpreting its meaning, and whether the defendant asked for a "full release" and the plaintiff agreed to give such a release is of no consequence. *Ibid.*

A release under seal, containing the words "I do hereby release the said W from all claims and demands which I may or might have against him and this release is in full of all demands against the said W every name and nature whether in law or in equity I may have against him to date," covers a claim for damages for an assault and battery. *Carr* v. *Weiss*, 532.

REPLEVIN.

Equitable replevin, see that subtitle under EQUITY JURISDICTION.

RES INTER ALIOS.

See that subtitle under EVIDENCE.

RES IPSA LOQUITUR.

See that subtitle under NEGLIGENCE.

RES JUDICATA.

An action of tort against three persons for an alleged wrongful removal of the plaintiff from the offices of director and treasurer of a certain corporation was barred as to two of the defendants by a decree of the Supreme Judicial Court dismissing a bill in equity by the plaintiff against those defendants, and was barred as to the third defendant by a final decree of the Supreme Court of Nova Scotia. *Perry* v. *Davis*, 296.

Action of the Superior Court, reversing, on a review under R. L. c. 100, § 4, of a decision by the mayor of a city removing the members of the licensing board, and finding that the chairman was not guilty of any violation of law, will not prevent a report in writing, made to the board by police officers and stating violations of the law by various innkeepers, from being introduced

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in evidence in behalf of the defendant in an action of libel against the proprietor of a newspaper for the publication of statements of laxity of the board, such report tending to show the truth of the statements contained in the alleged libel. *Stearns* v. *Long*, 152.

See also EQUITY JURISDICTION, *Res judicata*; and the title, JUDGMENT.

RULE AGAINST PERPETUITIES.

See that subtitle under DEVISE AND LEGACY.

RULES OF COURT.

Equity Rule 36. *Stockbridge* v. *Mixer*, 415.

Common Law Rule 3 of the Superior Court. *Norwood* v. *Dodge*, 351.

SALE.

Validity.

St. 1907, c. 394, as amended by St. 1911, c. 163, providing that whoever gives or attempts to give false or insufficient measure shall be punished as there stated, is constitutional, and is not unconstitutional as applied to a sale by insufficient measure of a barrel of sweet potatoes in the original package in which they were brought from another State. *Commonwealth* v. *Gussman*, 349.

Stoppage in Transitu.

In an action by the consignee of goods against a carrier for their alleged conversion, where it appears that the carrier returned the goods to the consignor, who claimed the right of stoppage *in transitu*, it was held that, on the evidence, the question whether the transit had been terminated by a constructive delivery of the goods to the consignee, so that the right of stoppage *in transitu*, if it existed, had been lost, was a question of fact for the jury. *Coleman* v. *New York, New Haven, & Hartford Railroad*, 45.

The insolvency of a consignee of goods which is necessary to give the consignor the right of stoppage *in transitu* need not be shown by proof of adjudication, but consists simply of inability to pay debts in the usual course of business, and may be proved as a rational inference from convincing facts and circumstances. *Coleman* v. *New York, New Haven, & Hartford Railroad*, 45.

Evidence which, it was held, would warrant a finding that the consignee was insolvent. *Ibid.*

Conditional Sale.

Action for the alleged conversion of a diamond ring sold by the plaintiff by a conditional sale to one who pawned it to the defendant. *Sallinger* v. *Collateral Loan Co.* 266.

Foreclosure Sale.

At a sale in foreclosure of a mortgage of real estate "subject to interest," it was held that the purchaser bought the property with an agreement on his part to pay the interest then due on the mortgage, so that the mortgagee,

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Sale (*continued*).

in accounting with the mortgagor or his successor in title for the proceeds of the sale, was not entitled to be credited with the amount due as interest on the mortgage at the time of the sale. *Crane* v. *White*, 478.

Sale by Agent.

While a merchandise broker, who has negotiated a sale between a seller and a buyer of goods, is authorized by virtue of his employment to write out and sign bought and sold notes as memoranda of the agreement to make it binding under R. L. c. 74, § 5, he has no authority as broker to make a contract in writing for the parties. *Hobart* v. *Lubarsky*, 528.

An action for the non-delivery of the goods therefore cannot be maintained against the alleged seller of the goods upon a sold note signed in his behalf by a broker, which is declared upon as a contract in writing. *Ibid.*

If the buyer in such a case has a remedy, it is by an action on the oral agreement, of which the sold note must be alleged to be a memorandum, and the plaintiff in order to recover must show that the defendant authorized the broker to make in his behalf the oral contract of sale which the plaintiff alleges was broken. *Ibid.*

Bill of Sale intended for Security.

Rights of a mortgagee under a bill of sale of personal property absolute in form but intended for security. *Coggan* v. *Ward*, 13.

SALISBURY BEACH RESERVATION.

St. 1912, c. 715, purporting by § 4 to authorize the Salisbury Beach Reservation Commission to take certain land by right of eminent domain as a public reservation and providing in § 10 that "Said commission may sell or lease any lands or rights in land taken or acquired by it, which are not needed as a public reservation," was held to be unconstitutional as an attempt to authorize the exercise of the right of eminent domain in part for a private purpose, and because it was impossible to separate the valid from the invalid portions of the statute. *Salisbury Land & Improvement Co.* v. *Commonwealth*, 371.

SEAL.

As to promissory note under seal, see *Clarke* v. *Pierce*, 552.

SECRETARY OF STATE.

Whether facts stated in an agreed statement of facts in a certain action would be competent evidence to controvert a statement of facts appended by the Secretary of State as a note to the official copy of a statute, was not decided. *Tuttle* v. *Boston*, 57.

SENTENCE.

Proper sentence for an attempt to commit a crime, see *Kelley* v. *Commonwealth*, 209.

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SET-OFF.

The doctrine of set-off, applied by statute to actions at law, had its origin in courts of equity, where the power to compel a set-off of cross demands or of judgments has been exercised whenever necessary for the proper administration of justice. *Perry* v. *Pye*, 403.

SNOW AND ICE.

The owner of a building in the city of Boston, to which St. 1892, c. 419, § 66, applied, and which was occupied by a tenant to whom it was leased by an unrecorded lease for twenty years, was held by reason of certain provisions in the lease not to be liable to a person injured from slipping on ice on the adjoining sidewalk formed by water discharged from a spout attached to the building. *Cerchione* v. *Hunnewell*, 588.

SPECIAL PRECEPT.

See SUPPLEMENTARY PROCESS.

SPENDTHRIFT

Neither creditors nor assignees of a spendthrift, it was held, had any right to reach the income of a trust created for the benefit of the spendthrift which provided that the income should be paid to him during his lifetime, but without power or alienation and not subject to interference or control by creditors, where it appeared that the trust was created upon the withdrawal by the spendthrift of his opposition to the allowance of a certain will, which opposition had not been made in good faith and was merely an attempt to extort a settlement for his benefit. *Hale* v. *Bowler*, 354.

STATUTE.

Validity.

Time within which, in order to veto a bill, the Governor must return it, with his objections to it, to the branch of the Legislature in which it originated. *Tuttle* v. *Boston*, 57.

Construction.

Statutes imposing taxes are to be construed strictly and the right to tax is not to be extended by implication. By RUGG, C. J. *Martin L. Hall Co.* v. *Commonwealth*, 326.

Statutes cited and expounded, see page 733.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

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STATUTES CITED AND EXPOUNDED.

See page 733.

STREET RAILWAY.

The claims of holders of bonds of a street railway company, secured by a mortgage to a trust company, were held rightly to have been given priority, by a receiver appointed in a suit in equity to foreclose the mortgage, over a claim of a second street railway company for an agreed compensation for power, payments of which were two years in arrears, it not appearing that the delay in instituting the foreclosure proceedings was for the purpose of benefiting the mortgagee by the claimant's expenditures. *Old Colony Trust Co.* v. *Medfield & Medway Street Railway*, 156.

Definition of the phrase, "highest degree of care," and of the word "negligence," as used in St. 1907, c. 392, § 1, see *Buckley* v. *Boston Elevated Railway*, 50.

Liability for negligence, see NEGLIGENCE, *Street Railway*.

SUBROGATION.

In an action on a probate bond given by one of two trustees, in which judgment had been obtained against the defendant surety because of a misappropriation of trust funds by the trustee for whom the defendant was surety, it appeared that the two trustees were entitled to the whole income of the trust during their lives, and, because of an agreement as to subrogation made by them with the defendant, it was held that the defendant was subrogated to the rights of the two principals to receive the income from the entire trust fund for the period between the time of the misappropriation and the time of the death of the other trustee, and that, therefore, to avoid circuity of action, the income of the part of the trust fund that had been misappropriated would be regarded as fully accounted for by the trustees, and was not to be included in the amount for which execution was to issue. *Harmon* v. *Weston*, 242.

Surety on the probate bond of one of two trustees was held not to have any right in the principal of the trust by reason of subrogation to rights of the other trustee, who had as to the principal merely a power of appointment by will over a certain portion of the principal of the trust. *Ibid.*

SUICIDE.

In the absence of clear proof there is a presumption of fact that a person found dead did not commit suicide. *Bohaker* v. *Travelers Ins. Co.* 32.

In an action on a policy of accident insurance to recover for the death of the insured from accidental bodily injuries, where the policy contains a provision that "suicide whether sane or insane is not covered," and it appears that at the time of the accident, which was seen by no one, the insured was delirious by reason of severe typhoid fever, although the burden may be upon the plaintiff to prove that the death of the insured was not due to suicide, yet in the absence of evidence of suicide this burden may be found to have been sustained by the presumption of fact against self-destruction. *Ibid.*

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SUMMARY PROCESS FOR POSSESSION OF LAND.

A judgment for the plaintiff in an action of summary process for possession of certain land, entered after a full trial of the question, whether the plaintiff and his predecessors in title had notice of a lease of the premises for more than seven years, given by a former owner to the defendant before the plaintiff's predecessor received title, but not recorded, was held to be *res judicata* barring the maintenance of a suit in equity to establish and protect the lessee's right to possession, begun before the action of summary process was begun, and continued under an amended bill after the judgment in that action. *Edwards* v. *Columbia Amusement Co.* 125.

It also was held that the bill in equity as amended was not an "action . . . brought . . . to recover the lands or tenements in question," to which by R. L. c. 181, § 9, the judgment in the action of summary process would not be a bar, because the plaintiff did not seek therein to settle the title to the land, but only the right to present possession. *Ibid.*

SUPERIOR COURT.

Common Law Rule 3. *Norwood* v. *Dodge*, 351.

Equity Rule 36. *Stockbridge* v. *Mixer*, 415.

Section 1 of St. 1911, c. 433, gives to the Superior Court power to order transferred to the Land Court a writ of entry wrongly begun in the Superior Court in 1909, in which the tenant has appeared, answered and claimed a trial by jury; and such statute is constitutional. *Browne* v. *Browne*, 76.

The Superior Court has not jurisdiction of the action, described in R. L. c. 178, § 47, to recover possession of land upon which a levy of execution has been made as fraudulently standing in the name of a person other than the judgment creditor. *Ibid.*

The Superior Court has no power, after the commencement by trustee process of an action of tort for conversion and malicious use of civil process, to allow amendments changing the writ to one of summons and attachment and adding to the declaration a count for malicious prosecution. *Guarino* v. *Russo*, 83.

Where, after a trial by jury in the Superior Court of issues framed in the Land Court, the proceedings in the Superior Court have come to an end and a certificate has been sent from the clerk of the Superior Court to the Land Court under R. L. c. 128, § 14, an appeal to this court will lie under St. 1904, c. 448, § 8, (St. 1910, c. 560, § 6,) from an order of the Superior Court allowing a motion to amend one of the issues framed in the Land Court. *Weld* v. *Clarke*, 324.

Where in a writ of entry brought in the Land Court, one of the issues framed for trial in the Superior Court is to determine the amount of rents and profits for which the tenant is liable, and, although the tenant seasonably has made a claim for improvements, the form of the issue does not make it plain that the tenant is entitled to a set-off for improvements against rents and profits as provided in R. L. c. 179, §§ 17–27, the judge of the Superior Court before whom the issues are tried properly may allow an amendment of the issue to make plain the right of the tenant to a set-off for improvements. *Ibid.*

The action on the part of the Superior Court, called for by St. 1911, c. 751, Part

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III, § 11, as amended by St. 1912, c. 571, § 14, is not a mere perfunctory registration of approval of the decision of the Industrial Accident Board, but is an exercise of its judicial function by the entering of such a decree as will enforce the legal rights of the parties as disclosed by the facts appearing on the record. *McNicol's Case*, 497.

SUPPLEMENTARY PROCESS.

By the provisions of R. L. c. 170, § 1, a foreign corporation, like a natural person not an inhabitant of this Commonwealth, cannot be sued in this Commonwealth unless it has been served with process within the Commonwealth or unless an effectual attachment of its property within the Commonwealth has been made upon the original writ. And, where there has been no such service or attachment, jurisdiction cannot be acquired by a subsequent attachment made by supplementary process under R. L. c. 167, § 80. *Roberts* v. *Anheuser Busch Brewing Association*, 341.

SURETY.

The surety on a probate bond is liable jointly with his principal; and, if in an action on the bond no service has been made on the principal and he has not appeared, this does not affect the liability of the surety, who is liable for the default of the principal to the full extent of that default not exceeding the amount of the judgment for the penal sum of the bond. *Harmon* v. *Weston*, 242.

Nature of execution which should issue in case of a judgment for the plaintiff in an action against the surety on a probate bond of a trustee. *Ibid.*

Application for the benefit of such surety of the doctrine of subrogation to certain rights of his principals in the trust. *Ibid.*

SURVIVAL OF ACTIONS.

An executor cannot maintain an action of tort for false representations made to his testator who relied upon them to his loss, a loss thus incurred not being "damage to real or personal property" for which an action survives under R. L. c. 171, § 1. *Rockwell* v. *Furness*, 557.

The expenditure of money by an executor upon the prosecution of an action for an alleged wrong done to his testator under the mistaken belief that the right of action survives under R. L. c. 171, § 1, when it is not within that statute, has no effect to revive the extinct cause of action. *Ibid.*

In an action of tort by an executor for an alleged wrong done to his testator, the defense that the right of action died with the testator and did not survive to the executor under R. L. c. 171, § 1, is available under an answer which contains only a general denial. *Ibid.*

TAX.

Oath to List of Taxable Property.

Under the provision of St. 1909, c. 490, Part I, § 43, that where a person bringing in a list of taxable property to the assessors of a town "is absent from the place in which the tax is to be assessed during the whole period when such

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oath may be made, it may be administered by a notary public," such oath may be made lawfully before a notary public by a person who is not a resident of such town but resides elsewhere in the Commonwealth, although during the period in question he has been "in the town casually." *Sears* v. *Nahant*, 329.

Assessment.

The provision of St. 1909, c. 490, Part I, § 49, that, "after personal property has been legally assessed in any city or town to an executor, administrator or trustee, an amount not less than that last assessed by the assessors of such city or town in respect of such property shall be deemed to be the sum assessable, until a true list of such property is brought in to the assessors in accordance with the provisions of section forty-one," is a mandatory requirement, which the assessors must obey absolutely. *Sears* v. *Nahant*, 329.

Under such provision, whatever the precise meaning of the term "true list" may be, it is plain that a list filed by an executor, which omits taxable personal property of the value of hundreds of thousands of dollars for which he is liable as executor because no account has been allowed by the Probate Court showing its transfer to the same person as trustee, even though such list was filed under an honest mistake as to the law, is not a true list within the meaning of the statute. *Ibid.*

Under the provisions of St. 1909, c. 490, Part I, § 85, that, "if the real or personal estate of a person, to an amount not less than one hundred dollars and liable to taxation, has been omitted from the annual assessment of taxes in a city or town, the assessors shall between the fifteenth and twentieth days of December next ensuing assess such person for such estate," the assessors of a town lawfully may make in December such an assessment upon property in regard to which they have at that time no knowledge that they did not have on the first day of April, if the property was omitted by the assessors from assessment at the usual time in good faith through a mistake of law as to their duty. *Ibid.*

Where a person who is the executor of a will is also the trustee thereunder, the personal property held by him as executor is to be assessed for taxation to him as executor until, under St. 1909, c. 490, Part I, § 23, cl. 7, he has made a distribution to himself as trustee which has been allowed by the Probate Court; and his giving notice to the assessors, in accordance with the requirement of that clause, of a distribution by him as executor does not constitute such a distribution. *Ibid.*

Failure of the assessors of a town to assess for taxation to an executor on April 1 certain property known to the assessors, which such executor insisted was not taxable to him as executor because, as asserted by him, he had distributed it within the meaning of St. 1909, c. 490, Part I, § 23, cl. 7, in no way estops the assessors from performing their duty by assessing the property to the executor on December 19 under § 85 of the same statute as property that "has been omitted from the annual assessment of taxes." *Ibid.*

Principles upon which it is determined whether personal property held by trustees, the beneficial interest in which is in shareholders whose shares are represented by transferable certificates on which dividends are paid, is to be assessed for taxation under St. 1909, c. 490, Part I, § 23, cl. 5, as "personal property held in trust" or under § 27 as personal property employed in the business of a partnership. *Williams* v. *Milton*, 1.

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Application of such principles, from which it was held, that a certain instrument created an investment trust and not a partnership and that accordingly the personal property of the trust must be assessed for taxation under St. 1909, c. 490, Part I, § 23, cl. 5, and not under § 27. *Williams* v. *Milton*, 1.

Upon petitions for the abatement of taxes brought by the trustees under a deed of trust called the "General Investment Trust," by the terms of which the powers and duties of the trustees were essentially the same as those of the petitioners in Williams v. Milton, *ante*, 1, it was held, following that decision, that the beneficiaries were *cestuis que trust* and were not partners, and that the trust property was to be assessed for taxation accordingly. *Foster* v. *Boston*, 31.

Notes secured by mortgages of land in another State, which on the first day of April of a certain year are in the possession of an ancillary administrator appointed in such other State to administer the estate in that State of a testator whose domicil was in this Commonwealth and whose will was proved here, lawfully cannot be assessed for taxation to the executor of the will in this Commonwealth. *Gray* v. *Lenox*, 598.

The provision of St. 1909, c. 490, Part I, § 23, cl. 7, that personal property of a deceased person shall be assessed to the executor or administrator for three years or until it has been distributed and notice of such distribution has been given to the assessors, has no application to property which is not within the ownership, possession or control of the executor. *Ibid.*

Excise.

The general rule established by St. 1909, c. 440, that all taxes shall be assessed as of April 1, applies to excises on corporate franchises as well as to direct taxes and the deductions should be made as of the same date, so that St. 1912, c. 491, which was approved on April 16, 1912, and provided that it should take effect upon its passage, could not be applied lawfully to an assessment for the excise tax on domestic corporations for the year 1912. *Martin L. Hall Co.* v. *Commonwealth*, 326.

"Cash in bank," consisting of the amount standing to the credit of a domestic business corporation in a national bank or a trust company, is not included in the word "merchandise" nor the word "securities" in the provision of St. 1909, c. 490, Part III, § 43, relating to the excise imposed upon the franchises of such corporations. *Boston Railroad Holding Co.* v. *Commonwealth*, 493.

On Successions.

Shares of an unincorporated Massachusetts real estate trust which includes both real and personal property were held to be subject to the succession tax imposed by St. 1907, c. 563, § 1, as "property within the jurisdiction of the Commonwealth," although the holder of the shares at the time of his death had his domicil in another State and the certificates representing his shares were in a third State. *Peabody* v. *Treasurer & Receiver General*, 129.

Abatement.

A proceeding upon a petition in the Superior Court under R. L. c. 12, § 78, appealing from the refusal of the assessors of a city or town to abate a tax, is in the nature of an action at law. *Sears* v. *Nahant*, 234.

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Review by HAMMOND, J., of statutory provisions for the payment of costs and expenses in proceedings for the abatement of taxes. *Sears* v. *Nahant*, 234.

The provision in R. L. c. 12, § 81, (now St. 1909, c. 490, Part I, § 80,) that, in a proceeding upon a petition in the Superior Court appealing from the refusal of the assessors of a city or town to abate a tax, "if no abatement is granted, judgment shall be rendered for the city or town for its expenses and costs, which shall be taxed by the court," was held not to authorize the taxation of counsel fees paid by a town in favor of which a judgment is rendered on a refusal to grant an abatement. *Ibid.*

Tenants in Common.

A levy and sale upon an execution of "all" the "right, title and interest" of the debtor in certain real estate described in the execution deed by metes and bounds, where the debtor's title in the real estate described is as one of several heirs of one who had died seised of several other parcels of real estate as well as the one described, while of no effect without the consent of the other heirs, is effectual, in case a portion of the premises described subsequently is set off to the judgment debtor in partition proceedings, to establish a title by estoppel in the purchaser at the sale to such interest in the portion thus set off by partition as was the judgment debtor's at the time of the sale. *Cressey* v. *Cressey*, 65.

TOWNS.

See MUNICIPAL CORPORATIONS.

TRADEMARK.

It was assumed as practically conceded, that the words "Boston Wafers," used to designate an article of manufacture and trade, were merely descriptive and could not be made a valid trademark, in *C. A. Briggs Co.* v. *National Wafer Co.* 100.

Suit in equity to restrain unfair use of a merely descriptive epithet, not capable of becoming a valid trademark, associated with a class of goods manufactured by the plaintiff. *Ibid.*

TRADE NAME.

A merely descriptive epithet, which is incapable of becoming a valid trademark, by long and exclusive use in trade may become so associated with a particular class of goods or with the specific product of a particular manufacturer, that the attaching of the epithet to a similar product by a competing manufacturer or seller under certain circumstances may be restrained in equity as unfair competition. *C. A. Briggs Co.* v. *National Wafer Co.* 100.

If such a manufacturer has created for the name within a certain territory a secondary meaning which entitles him to protection against unfair competition in its use, he is not entitled to restrain the use of such trade name outside the territory within which he has established the meaning on which his rights depend. *Ibid.*

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TRUST.

When Distribution by Executor to Trustee takes Effect.

Where a person who is the executor of a will is also the trustee thereunder, the personal property held by him as executor is to be assessed for taxation to him as executor until, under St. 1909, c. 490, Part I, § 23, cl. 7, he has made a distribution to himself as trustee which has been allowed by the Probate Court; and his giving notice to the assessors, in accordance with the requirement of that clause, of a distribution by him as executor does not constitute such a distribution. Following Welch v. Boston, 211 Mass. 178. *Sears* v. *Nahant*, 329.

Validity.

In an action against a widow on a promissory note signed by her during her husband's lifetime and made payable to the plaintiff, who was her husband's brother, there was evidence warranting findings that the defendant, having property which equitably belonged to her husband, in order to make sure that his children by a former wife should share in this property, at the request of her husband made the note payable to the plaintiff, who agreed to act as trustee for such children, and delivered the note to her husband to be kept by him as the agent of the plaintiff as such trustee; and it was held that on these facts it could be found that there was a good delivery of the note to the payee and that it was given for a valid consideration. *Crosier* v. *Crosier*, 535.

Construction of Trust Instrument.

Construction of a provision of a will that, upon the death of an unmarried daughter of the testator, a trust should be terminated and the property be distributed "among my heirs at law, according to the statutes which shall then be in force in said Commonwealth regulating the distribution of intestate estates," from which it was held that by the words "heirs at law" the testator designated those persons, not expressly excluded, who would have been his heirs at law if he had died at the time of the death of his unmarried daughter. *White* v. *Underwood*, 299.

Construction of provisions of a will in which the testator left the residue of his estate to trustees for the support and maintenance of the testator's wife "and the care, maintenance and education of our children, during her life, or until she shall marry again," from which it was held that the income was received by the testator's widow subject to a trust for the reasonable support of herself and her children until her death or marriage, and that so much of the income received by the widow as was not needed for the reasonable support of herself and her children was held by her as her own property free from trust. *Johnson* v. *Johnson*, 276.

Charitable Trust.

Proper disposition of a legacy given by will to a private charitable corporation which refuses to accept it. *Read* v. *Willard Hospital*. 132.

Application of the doctrine of *cy pres* to a devise by a widow of her former residence "for an Old Folks Home, both male and female, of Evangelical Creed," where it appeared that the house given was not suitable for an old

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folks' home and certain property devoted to the home by the will was insufficient for the purpose. *Norris* v. *Loomis*, 344.

Spendthrift Trust.

Neither creditors nor assignees of a spendthrift, it was held, had any right to reach the income of a trust created for the benefit of the spendthrift which provided that the income should be paid to him during his lifetime, but without power of alienation and not subject to interference or control by creditors, where it appeared that the trust was created upon the withdrawal by the spendthrift of his opposition to the allowance of a certain will, which opposition had not been made in good faith and was merely an attempt to extort a settlement for his benefit. *Hale* v. *Bowler*, 354.

Mortgage to Trustee to secure Bondholders.

Bill in equity by a holder of bonds of a mining corporation, against the directors of the corporation, the corporation and trustees holding the corporation property in mortgage to secure the bondholder's rights, for an accounting as to funds which the plaintiff alleges should be paid to the trustees because of waste and strip committed by persons to whom the corporation had let its property. *Young* v. *Haviland*, 120.

Real Estate Trust.

Statement and application of the principles upon which it is determined how personal property held by trustees, the beneficial interest in which is in shareholders whose shares are represented by transferable certificates on which dividends are paid, is to be assessed for taxation. *Williams* v. *Milton*, 1; *Foster* v. *Boston*, 31.

Shares of an unincorporated Massachusetts real estate trust which includes both real and personal property were held to be subject to the succession tax imposed by St. 1907, c. 563, § 1, as "property within the jurisdiction of the Commonwealth," although the holder of the shares at the time of his death had his domicil in another State and the certificates representing his shares were in a third State. *Peabody* v. *Treasurer & Receiver General*, 129.

In a suit in equity to enforce against certain trustees a trust in certain land which they had received from their predecessors in office, who had taken it without consideration and without notice of that trust, where it appears that the defendants and their predecessors had held the land for the benefit of shareholders in a real estate trust, it was held that such shareholders stood in no better position than the defendants. *Bisbee* v. *Mackay*, 21.

Trust created by Decree of Court.

Where a trust is created by an interlocutory decree made by the Superior Court in a suit in equity and a trustee is appointed under the general equity jurisdiction of the court with duties analogous to those of a receiver, such trustee is not required to give a bond to the judge of probate under R. L. c. 150, § 1, and his accounts as trustee can be settled in the original suit. *Rice* v. *Merrill*, 419.

In a suit in equity by an aged widow, seeking to set aside a deed of property

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made by her to the defendant conditioned upon her comfortable support by the defendant during her lifetime, an interlocutory decree may be made ordering the defendant to convey to a certain person as trustee all the property conveyed to him by the plaintiff, to be held by such trustee for the benefit of the plaintiff upon trusts stated in the decree, and, upon the plaintiff's death, to apply any balance of the trust fund in his hands as therein directed in satisfaction of any just debts or expenses incurred under the trust, and to pay the balance then remaining to the plaintiff's executor or administrator. *Rice* v. *Merrill*, 419.

Where the defendant has made a deed to the trustee in accordance with the terms of such a decree, which is accepted by the plaintiff, who enjoys the benefit of the trust until her death more than two years later, the executor of the plaintiff's will, if the circumstances under which the interlocutory decree was made do not appear, cannot be heard to assert that the decree or the trust created by it was invalid. *Ibid.*

In such a case the duties of the trustee appointed by the interlocutory decree do not terminate upon the death of the original plaintiff in the suit, and it is his duty, before paying over the balance of the fund to the executor of the will of the deceased plaintiff, to pay the expenses incurred under the trust, comprising all disbursements and obligations for the comfortable support and maintenance of the deceased plaintiff, for his own charges and compensation, and for proper services rendered to him by counsel, including necessary services rendered in litigation incidental to the settlement of his accounts. *Ibid.*

Constructive.

Suit in equity between partners for an accounting as to the proceeds of the sale of an option, alleged to have been taken by the defendant in his own name, for an extension of a lease held by the partnership, which option the defendant sold for his own benefit. *Lurie* v. *Pinanski*, 229.

Taxation.

Statement and application of principles upon which it is determined how personal property held by trustees, the beneficial interest in which is in shareholders whose shares are represented by transferable certificates on which dividends are paid, is to be assessed for taxation. *Williams* v. *Milton*, 1; *Foster* v. *Boston*, 31.

Liability of Surety on Probate Bond of Trustee.

Under Pub. Sts. c. 143, §§ 18, 20, cl. 3, (now R. L. c. 149, §§ 29, 31,) where a judgment is obtained in an action against the surety on the probate bond of a trustee, execution must issue, without expressing that it is for the use of any person, for the full amount of all the estate of the testator which came to the hands of the trustee for which he did not satisfactorily account either in the Probate Court or by payments made directly to or for the benefit of the parties entitled thereto. *Harmon* v. *Weston*, 242.

In an action on a probate bond given by one of two trustees, in which judgment had been obtained against the defendant surety because of a misappropriation of trust funds by the trustee for whom the defendant was surety, it appeared that the two trustees were entitled to the whole income

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of the trust during their lives, and, because of an agreement as to subrogation made by them with the defendant, it was held that the defendant was subrogated to the rights of the two principals to receive the income from the entire trust fund for the period between the time of the misappropriation and the time of the death of the other trustee, and that, therefore, to avoid circuity of action, the income of the part of the trust fund that had been misappropriated would be regarded as fully accounted for by the trustees, and was not to be included in the amount for which execution was to issue. *Harmon* v. *Weston*, 242.

Surety on a probate bond of one of two trustees was held not to have any right in the principal of the trust by reason of subrogation to rights of the other trustee, who had as to the principal merely a power of appointment by will over a certain portion of the principal of the trust. *Ibid.*

Enforcement against succeeding Holder of Estate.

In a suit in equity by an investor against the successors of trustees to whom a single trustee had conveyed without consideration certain land which he held subject to a trust providing for repayment to the plaintiff of his investment, the trust was enforced although the defendants' predecessors in office had had no notice of it. *Bisbee* v. *Mackay*, 21.

In such a case it appeared that the defendants and their predecessors in office had held the real estate for the benefit of shareholders in a real estate trust, and it was held that such shareholders stood in no better position than the defendants. *Ibid.*

In a suit in equity by a fraternal beneficiary corporation against the executrix of the will of a former treasurer of a subordinate lodge to impress a fund in a bank account in such former treasurer's own name, in which also were mingled moneys received by him from various other sources, with a trust in the plaintiff's favor and to compel its transfer, it was held that a mistake of the former treasurer in overdrawing the account at the bank did not act, under the circumstances, as a dissipation of the fund, and that a decree for the plaintiff was justified. *Portuguese Fraternity of the United States* v. *Liberty Trust Co.* 27.

TRUSTEE PROCESS.

The Superior Court has no power, after the commencement by trustee process of an action of tort for conversion and malicious use of civil process, to allow amendments changing the writ to one of summons and attachment and adding to the declaration a count for malicious prosecution. *Guarino* v. *Russo*, 83.

UNDUE INFLUENCE.

At the trial, on appeal from a decree of the Probate Court allowing a will, of an issue, whether the will was procured by undue influence, the appellee being the testator's wife by a second marriage and the appellant being one of several children of the testator, all by his first marriage, an exception to the exclusion of evidence tending to show that the appellant's mother had stated to him in the presence of the testator and the appellee that she had caught them in illicit relations, and that the appellant thereupon ordered the

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appellee from the house, was overruled because no foundation had been laid for the evidence, and because the time to which the evidence related was so remote that its exclusion as a matter of discretion could not be deemed improper. *Aldrich* v. *Aldrich*, 164.

At such a trial the widow, although a beneficiary under the will, is not an adverse party, and her failure to testify in support of the will is not evidence from which an inference can be drawn that, if she had testified, her testimony would have tended to prove the will invalid. *Ibid.*

UNFAIR COMPETITION.

A merely descriptive epithet, which is incapable of becoming a valid trademark, by long and exclusive use in trade may become so associated with a particular class of goods or with the specific product of a particular manufacturer, that the attaching of the epithet to a similar product by a competing manufacturer or seller under certain circumstances may be restrained in equity as unfair competition. *C. A. Briggs Co.* v. *National Wafer Co.* 100.

If such a manufacturer has created for the name within a certain territory a secondary meaning which entitles him to protection against unfair competition in its use, he is not entitled to restrain the use of such trade name outside the territory within which he has established the meaning on which his rights depend. *Ibid.*

On an accounting for profits in a certain suit to restrain such unfair competition, it was held that the defendant's unlawful dealings showed no profits. *Ibid.*

UTTERING FORGED ORDER FOR MONEY.

Since St. 1909, c. 442, took effect, a male person who commits the crime of uttering a forged order for money not exceeding $50 in value may be sentenced by a police, district or municipal court to imprisonment at hard labor in a house of correction. *Moulton* v. *Commonwealth*, 525.

Proper sentence of a woman convicted of such a crime. *Ibid.*

VETERAN.

The preference of veterans provided for in the civil service law is not to be extended by implication from equivocal words of the statute. *Phillips* v. *Metropolitan Park Commission*, 502.

The definition of the word "veteran" in R. L. c. 19, § 20, designating those persons who are entitled to the veterans' preference under the civil service law provided for by that chapter, does not include one who served in the navy of the United States between 1898 and 1903 and for distinguished conduct in the presence of the enemy received a medal of honor from the Secretary of the Navy. *Ibid.*

VETO.

Effect of a certain veto by the mayor of Cambridge. *Storer* v. *Downey*, 273.

Time within which, in order to veto a bill, the Governor must return it, with his objections to it, to the branch of the Legislature in which it originated. *Tuttle* v. *Boston*, 57.

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WAIVER.

At the argument of exceptions in an action for the price of goods sold by the receivers of the property of a corporation, which was brought improperly in the name of the corporation by them as receivers, when it should have been brought by the receivers in their own names, if the defendant states in his brief that "there is no dispute as to the prices charged or as to the receipt of the goods by the defendant" and that "the sole defense was that the plaintiffs' claim had been discharged by an instrument in writing," this is a waiver of any objection to the form of the writ and of the defense that the action was brought by the wrong party. *Rochester Tumbler Works* v. *Mitchell Woodbury Co*, 194.

The objection, that a provision in a building contract, which makes the issuing of the final certificate by the architect conclusive as to the performance of the contract, is void as an attempt to oust the courts of their jurisdiction, is not open after the decision of the architect has been made and the parties have been notified of it without previous objection from either of them. *Hathaway* v. *Stone*, 212.

In a suit in equity by an automobile dealer against a manufacturer to enforce a contract whereby the plaintiff was appointed the defendant's exclusive agent in a certain territory, findings of the trial judge that the plaintiff had not waived the provisions of the contract were held not to have been clearly wrong. *Wier* v. *American Locomotive Co.* 303.

Evidence, which was held not to warrant a finding that the agent in this Commonwealth of an insurance company incorporated in another State had authority, without instructions from the home office, to waive a provision of a policy providing that no legal proceedings should be commenced under the policy until after three months from the filing of a proof of loss. *Thomson* v. *American Fidelity Co.* 460.

WASHINGTON STREET TUNNEL.

Construction of St. 1902, c. 534, §§ 7, 10, 16, with regard to the computation of the annual rental to be paid by the Boston Elevated Railway Company to the city of Boston for the use of the Washington Street Tunnel. *Boston* v. *Boston Elevated Railway*, 41.

WATERCOURSE.

In a suit in equity by an owner of property on a stream to enjoin pollution of the stream and for damages, the plaintiff may recover not only for diminution in the rental value of his property during the time since the pollution began, but also for depreciation in the market value of the property, and for the cost of cleaning out his mill pond contaminated by the defendant's pollution, if he shows that he has suffered damages in those particulars because of the defendant's acts. *Parker* v. *American Woolen Co.* 176.

Where in such a suit it appears that certain damages were caused to the plaintiff by reason of pollution of the stream by the defendant, and that the water, in the condition in which it was when it reached the defendant and before he polluted it, would not have harmed the plaintiff, the plaintiff is entitled to

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full compensation for all the damage caused by the defendant's acts irrespective of the fact that, if the water when it came to the defendant had been purer, the pollution caused by the defendant would have been less injurious to the plaintiff. *Parker* v. *American Woolen Co.* 179.

And if, in such a suit it appears that the defendant has polluted the stream without right, and the plaintiff claims as one element of his damages diminution in the rental value of his premises, and it also appears that the use which the plaintiff makes of the stream also pollutes it but that he has a prescriptive right so to use it, a request by the defendant for a ruling that the plaintiff, in computing the rental value of his property, is not entitled to include any profit "due to his own illegal pollution of the stream," is inapplicable and should not be granted. *Ibid.*

In an action for the obstructing of a natural watercourse in the course of certain grading work on the defendant's land, there was evidence that the work was done by a contractor and a subcontractor, but it was held that the evidence warranted a finding that the defendant had retained a directory control over the manner in which the grading was done, so that the defendant could be found to be liable for the damage caused by the obstruction. *Christiansen* v. *Lannin*, 322.

WAY.

Private.

One who has a right of way over a private street adjoining his land has a right to the use of the surface for the usual purposes of such a way and a right to enter upon it and prepare it for that use. *Kaatz* v. *Curtis*, 311.

In a suit in equity to establish a certain private way as designated upon a certain plan recorded in the registry of deeds, it appeared that the previous owner of the land of both the plaintiff and the defendant in his will devising to the defendant a lot of land and the executor of the will in a deed conveying another lot to the plaintiff under a license from the Probate Court, both had bounded the lots on the private way as shown on a recorded plan, referred to by the registry volume and page, and it was held that the plan referred to in the devise to the defendant and in the deed to the plaintiff was incorporated in each as a part of the devise and conveyance so far as applicable thereto, and that the defendant as against the plaintiff was bound by the location of the way thus defined. *Ibid.*

Upon the question, whether a right of way defined in a deed by ambiguous words was over a proposed private street only so far as such street should adjoin the land conveyed or whether the easement extended over a prolongation of the proposed street upon other land of the grantor, the acts of a subsequent owner of such other land more than eight years after the making of the deed to be interpreted have no bearing on the meaning of the doubtful language of that deed. *Hurd* v. *General Electric Co.* 358.

Where the owner of a tract of land conveyed a parcel of it bounded "on a proposed street to be laid out fifty feet wide one hundred and eighty feet . . . with a right of way over said proposed street," it was held that on all the evidence it was to be inferred that at the date of the deed there did not exist in the contemplation of the grantor or the grantee any other or longer proposed street than such as would adjoin the granted premises. *Ibid.*

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Where a deed to a railroad corporation of a part of a farm contains a stipulation for a "passway" for the benefit of the grantor "over" the railroad "for farming purposes," a successor in title to the grantor has no right of way over the land so conveyed for any other than farm purposes. *Cornell-Andrews Smelting Co.* v. *Boston & Providence Railroad*, 381.

Where the owner of land used exclusively for agricultural purposes conveys a part of it by a deed containing a provision reserving "a right of open way" from the remainder of the land through the portion conveyed to a street, a subsequent grantee of the remainder of the land may use such way not only for agricultural purposes but also for any changed use to which it reasonably may be put in connection with the use of his land. *Ibid.*

Petition for damages alleged to have resulted from the discontinuance of a private way caused by changes made in the abolition of a grade crossing of a railroad and another private way. *Ibid.*

Public.

Estimation, under R. L. c. 48, § 15, of damages to property by the alteration of a highway. *Mitchell* v. *Boston*, 150.

WEIGHTS AND MEASURES.

St. 1902, c. 115, providing that a barrel of sweet potatoes shall contain one hundred and fifty pounds, is not a regulation of interstate commerce, and is constitutional. *Commonwealth* v. *Gussman*, 349.

St. 1907, c. 394, as amended by St. 1911, c. 163, providing that whoever gives or attempts to give false or insufficient measure shall be punished as there stated, is constitutional, and is not unconstitutional as applied to a sale by insufficient measure of a barrel of sweet potatoes in the original package in which they were brought from another State. *Ibid.*

WIDOW.

Allowance.

An allowance made to a widow under the provisions of R. L. c. 140, § 2, should not exceed an amount sufficient to provide for the necessities of the widow for such a period after the death of her husband as will give her an opportunity to adjust herself to her new situation. *Glover* v. *Glover*, 576.

On an appeal from a decree of a single justice of this court, the sum of $1,500 was held to be too large, and $500 to be a sum sufficient to provide for a certain widow's necessities. *Ibid.*

WILL.

Validity.

At the trial, on appeal from a decree of the Probate Court allowing a will, of an issue, whether the will was procured by undue influence, the appellee being the testator's wife by a second marriage and the appellant being one of several children of the testator, all by his first marriage, an exception to the exclusion of evidence tending to show that the appellant's mother had

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stated to him in the presence of the testator and the appellee that she had caught them in illicit relations, and that the appellant thereupon ordered the appellee from the house, was overruled because no foundation had been laid for the evidence and because the time to which the evidence related was so remote that its exclusion as a matter of discretion could not be deemed improper. *Aldrich* v. *Aldrich*, 164.

Revocation.

The mere fact of the disappearance of several instruments of a testamentary nature, which were executed by a testator after the making of a will which was offered for probate, in the absence of any contention that they had been taken from the testator's possession or were among his papers at his death, raises a presumption of fact that the testator destroyed them with an intention to revoke them. *Aldrich* v. *Aldrich*, 164.

At the trial of an issue, whether an instrument offered for probate as a will had been revoked, evidence that one of a firm of attorneys who had acted for the testator in drawing various wills, when handing to the testator within three months before his death the instrument offered for probate, stated to him that his, the attorney's, partner was under the impression that there was another will, and that the testator, after a very careful examination of the will, stated, "No, this is the one, this is the one I want," and then laid the will down on the bed at his side, where the witness left it, was held to have been admissible as tending to show an intention of the testator to destroy the wills that could not be found and to revive, or to select, the will offered for probate. *Ibid.*

Compromise as to Will.

In a proceeding under R. L. c. 148, §§ 14, 15, asking the Supreme Judicial Court to authorize a compromise of a controversy as to the estate of a testator, where a certain person is named in the will as executor and trustee and by the terms of the proposed compromise is not to be made trustee, such person is a necessary party to the agreement of compromise. *Parker* v. *New England Trust Co.* 226.

It seems that a bill in equity cannot be maintained to compel one who is named as executor and trustee in an alleged will, the proof of which is pending in the Probate Court, to administer the property of the estate of the alleged testator in accordance with an agreement of compromise, because unless the will is allowed there can be no compromise concerning it. *Ibid.*

Although, apart from the provisions of R. L. c. 148, §§ 14–18, this court has jurisdiction in equity to enforce a compromise agreement in regard to property acquired under a will between parties who are *sui juris* and where no contingent interests are affected, this jurisdiction does not extend to the enforcement of an alleged compromise agreement affecting future contingent interests. *Ibid.*

WITNESS.

Disclosure of Names of Witnesses.

In an action of tort against a street railway company for personal injuries, where there is no question in regard to a failure of either party to produce

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evidence within his or its exclusive knowledge or control and where the plaintiff's counsel has not referred to the opportunity of the defendant to produce more witnesses than the plaintiff, it is proper for the presiding judge to refuse to allow the counsel for the defendant in his argument to the jury to refer to St. 1911, c. 593, which authorizes the court to compel either party upon terms to disclose the names and addresses of its witnesses. *Delaney* v. *Berkshire Street Railway*, 591.

And if the defendant in such action has waived a motion under St. 1911, c. 593, that the plaintiff should be compelled to disclose the names of his witnesses, upon an agreement of the plaintiff's counsel to furnish their names, and the plaintiff's counsel in furnishing the names has omitted one of them through an innocent inadvertence, it is proper for the presiding judge to rule that the defendant's counsel in his argument to the jury cannot comment upon the omission. *Ibid.*

Absent Witness.

Argument by the plaintiff's counsel at the trial of an action against a street railway company for personal injuries and death, which was predicated on an assumption that the defendant had not produced witnesses to the accident whom it could have produced, and which was held to have been unfair and unwarranted by the evidence. *Buckley* v. *Boston Elevated Railway*, 50.

Claim investigator of a street railway company was allowed to explain, at the trial of an action against the company for personal injuries, the absence of witnesses whose names were in a report of the accident made by a conductor. *Callahan* v. *Boston Elevated Railway*, 171.

Whether Witness is Adverse Party.

At the trial, on an appeal from a decree of the Probate Court allowing a will, of an issue, whether the will was procured by undue influence of the testator's widow, who was named as executrix, the widow, although a beneficiary under the will, is not an adverse party, and her failure to testify in support of the will is not evidence from which an inference can be drawn that, if she had testified, her testimony would have tended to prove the will invalid. *Aldrich* v. *Aldrich*, 164.

WORKMEN'S COMPENSATION ACT.

Injuries Included.

Under St. 1911, c. 751, Part II, § 1, which provides that payments of compensation under the workmen's compensation act shall be made where an employee "received a personal injury arising out of and in the course of his employment," in order that a claim for such compensation should be sustained, it must appear that the injury had its origin in a risk connected with the employment and that it flowed from that source as a natural consequence. *McNicol's Case*, 497.

Injuries, resulting in death, received by a checker in the employ of a firm of importers, while doing his work at a dock, from blows or kicks given him by a fellow workman in "an intoxicated frenzy and passion," where such fellow workman was known to the superintendent in charge of the work to have the habit of drinking to intoxication and when in that condition to be quarrelsome, dangerous and unsafe to work with, and knowingly was permitted by

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such superintendent to continue to work on the day of the injury while in such a condition of intoxication, are injuries arising out of and received in the course of the workmen's employment within the meaning of the workmen's compensation act. *McNicol's Case*, 497.

The workmen's compensation act provides no compensation for injuries received outside this Commonwealth. *Gould's Case*, 480.

Amount of Compensation.

Under the workmen's compensation act a longshoreman, who was engaged in continuous labor in regular employment with different employers and was injured in the course of his employment with one of them, is entitled to receive, during his total incapacity for work resulting from such injury, a compensation equal to one half the "average weekly wages" earned by him in all of such regular employment and not merely one half of the wages paid to him by the employer in whose service he was injured. *Gillen's Case*, 96.

Who is a Dependent Beneficiary.

Under the workmen's compensation act, where compensation is to be made for injuries which resulted in the death of a workman, and it appears that the workman left a widow and a minor daughter of himself and such widow both of whom were living with him at the time of his death, it was held that the whole of the payment should be made to the widow. *McNicol's Case*, 497.

Not Extraterritorial.

The workmen's compensation act, contained in St. 1911, c. 751, St. 1912, cc. 571, 666, provides no compensation for injuries received outside this Commonwealth. *Gould's Case*, 480.

Procedure.

A proceeding under the workmen's compensation act brought before the Superior Court under the provisions of St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, is to be treated, in the main, as equitable rather than legal in its nature. *Ibid.*

Under St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, it is not improper that, with the certified copies of an order or decision of the Industrial Accident Board presented to the Superior Court for its decree, a petition should be filed setting forth the nature of the questions to be decided. *Ibid.*

Cases arising under the workmen's compensation act can be brought from the Superior Court before this court only by appeal and not by a bill of exceptions. *Gould's Case*, 480; *McNicol's Case*, 497.

Nature of Decree of Superior Court.

The action on the part of the Superior Court, called for by St. 1911, c. 751, Part III, § 11, as amended by St. 1912, c. 571, § 14, is not a mere perfunctory registration of approval of the decision of the Industrial Accident Board, but is an exercise of its judicial function by the entering of such a decree as will enforce the legal rights of the parties as disclosed by the facts appearing on the record. *McNicol's Case*, 497.

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WORDS.

"Accidental means." See *Bohaker* v. *Travelers Ins. Co.* 32, 33, 34, 35.
"Action." See *Gould's Case*, 480, 482.
"Action to recover possession." See *Browne* v. *Browne*, 76, 78.
"Automobiles." See *Wier* v. *American Locomotive Co.* 303, 305, 307, 309.
"Average weekly wages." See *Gillen's Case*, 96, 97.
"Boston Wafers." See *C. A. Briggs Co.* v. *National Wafer Co.* 100, 103, 104, 106, 107, 109, 111.
"Construction." See *Boston* v. *Boston Elevated Railway*, 41, 44.
"Date written in the mortgage." See *Old Colony Trust Co.* v. *Medfield & Medway Street Railway*, 156, 158.
"Due care." See *Bothwell* v. *Boston Elevated Railway*, 467, 469, 470.
"Expenses." See *Sears* v. *Nahant*, 234, 235, 236, 237, 238, 240, 241.
"Franchise." See *Attorney General* v. *Haverhill Gas Light Co.* 394, 399.
"Green horse." See *Raymond Syndicate* v. *American Express Co.* 140, 142.
"Heirs at law." See *White* v. *Underwood*, 299, 300.
"Highest degree of care." See *Buckley* v. *Boston Elevated Railway*, 50, 54.
"Judgment." See *Weld* v. *Clarke*, 324, 325; *Gould's Case*, 480, 482.
"Liquidated damages." *Kaplan* v. *Gray*, 269, 272.
"Merchandise." See *Boston Railroad Holding Co.* v. *Commonwealth*, 493, 494, 496.
"Negligence." See *Buckley* v. *Boston Elevated Railway*, 50, 54.
"Reference." See *Hanley* v. *Ætna Ins. Co.* 425, 431.
"Remainder." See *Bates* v. *Kingsley*, 62, 64.
"Returned." See *Tuttle* v. *Boston*, 57, 60, 61.
"Securities." See *Boston Railroad Holding Co.* v. *Commonwealth*, 493, 494, 496, 497.
"Suit." See *Gould's Case*, 480, 482.
"Within the jurisdiction of the Commonwealth." See *Peabody* v. *Treasurer & Receiver General*, 129, 130.

WRIT OF ENTRY.

Section 1 of St. 1911, c. 433, gives to the Superior Court power to order transferred to the Land Court a writ of entry wrongly begun in the Superior Court in 1909, in which the tenant has appeared, answered and claimed a trial by jury; and such statute is constitutional. *Browne* v. *Browne*, 76.

The action "to recover possession" of land upon which a levy of execution has been made as fraudulently standing in the name of a person other than the judgment debtor, which under R. L. c. 178, § 47, it is necessary for the judgment creditor to commence within one year after the return day of the execution, is a writ of entry in the ordinary form; and under St. 1904, c. 448, jurisdiction of such an action is in the Land Court; and not in the Superior Court. *Ibid.*

Where, after a trial by jury in the Superior Court of issues framed in the Land Court, the proceedings in the Superior Court have come to an end and a certificate has been sent from the clerk of the Superior Court to the Land Court under R. L. c. 128, § 14, an appeal to this court will lie under St. 1904, c. 448, § 8, (St. 1910, c. 560, § 6,) from an order of the Superior Court al-

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Writ of Entry (*continued*).

lowing a motion to amend one of the issues framed in the Land Court. *Weld* v. *Clarke*, 324.

Where in a writ of entry brought in the Land Court, one of the issues framed for trial in the Superior Court is to determine the amount of rents and profits for which the tenant is liable, and, although the tenant seasonably has made a claim for improvements, the form of the issue does not make it plain that the tenant is entitled to a set-off for improvements against rents and profits as provided in R. L. c. 179, §§ 17–27, the judge of the Superior Court before whom the issues are tried properly may allow an amendment of the issue to make plain the right of the tenant to a set-off for improvements. *Ibid.*

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